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# TRANSCRIPT OF RECORD

# Supreme Court of the United States

OCTOBER TERM, 1938

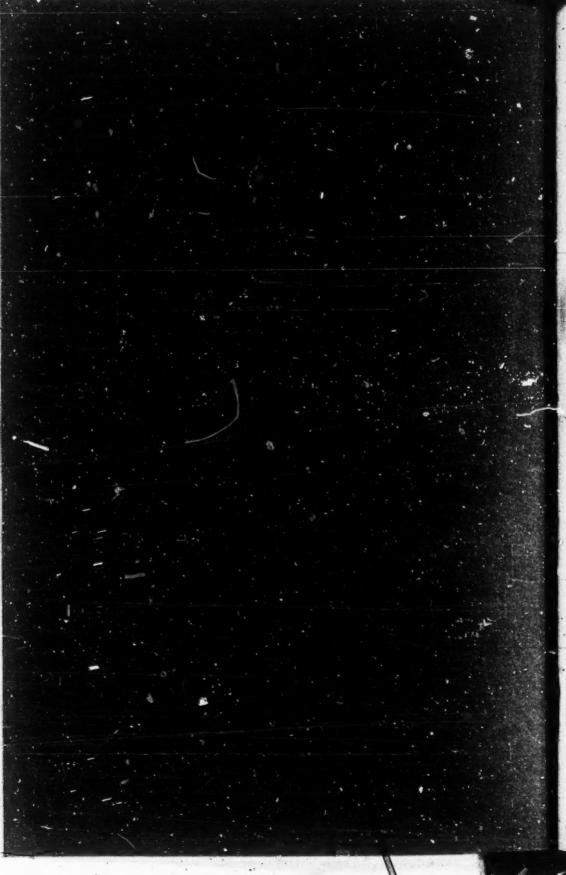
No. 704

AMERICAN TOLL BRIDGE COMPANY, APPELLANT,

VS.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA



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# OCTOBER TERM, 1938

# No. 704

# AMERICAN TOLL BRIDGE COMPANY, APPELLANT,

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[File endorsement omitted]

### [fol. 2] SUPREME COURT OF THE UNITED STATES

AMERICAN TOLL BRIDGE COMPANY, a Corporation, Appellant,

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE
L. Ware, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield
and Leon O. Whitsell as Members of and Constituting the
Railfoad Commission of the State of California, Appelleon

Joint Praecipe and Stipulation for Transcript of Record and Order Thereon—Filed February 1, 1939

To the Cierk of the Supreme Court of the State of California:

The parties above named in the above entitled cause join in this Praecipe and Stipulation for the preparation of the transcript of the record on appeal in said cause and you are requested to prepare a transcript of the record in said cause and to transmit the same to the Supreme Court of the United States at Washington, D. C., duly certified and authenticated and within the time prescribed by the rules of the Supreme Court of the United States, consisting of the following documents and portions of the record in said cause, which the said parties stipulate constitute the record [fol. 3] on appeal to the Supreme Court of the United States in said cause:

1. This Praecipe and Stipulation;

\* 2. Petition of American Toll Bridge Company, a corporation, to the Supreme Court of the State of California for Writ of Review including the following exhibits attached thereto:

Exhibit "A"—Order of the Railroad Commission of California instituting investigation, Case No. 4244;

Exhibit "B"—Order of the Railroad Commission of California instituting investigation, Case No. 4259;

Exhibit "C"—Decision No. 30612 of the Railroad Commission of California, including Opinion and Order:

Exhibit "D"—Petition of American Toll Bridge Company for Rehearing;

Exhibit "E"—Order of Railroad Commission of California Denying Rehearing;

Memorandum of Points and Authorities in Support of

Petition for Writ of Review; and

Affidavit of Will F. Morrish for Temporary Stay and for Suspension of Decisions and Orders of Railroad Commission During Pendency of Writ of Review;

3. Order of the Supreme Court of California Granting Temporary Stay of Decisions and Orders of Railroad Commission;

4. Suspending Band on Temporary Stay;

[fol, 4] 5. Order to Show Cause Why Operation of Decisions and Orders of Railroad Commission Should not be Stayed or Suspended During Pendency of Writ of Review;

6. Notice of Application for Stay and Suspension of De-

cisions and Orders of Railroad Commission;

7. Affidavit of Service:

8. Order of Supreme Court of California Resetting Hearing on Order to Show Cause and Extending Order Granting Temporary Stay of Decisions and Orders of Railroad Commission;

(Note.—The above items Nos. 3 to 8, inclusive, may be omitted in printing by making suitable reference thereto.)

- 9. Answer of Railroad Commission to Petition for Writ of Review;
- 10. Reply of American Toll Bridge Company to Answer of Railroad Commission to Petition for Writ of Review;

11. Writ of Review;

12. Order Staying and Suspending Decisions and ders of Railroad Commission Pending Writ of Review;

13. Suspending Bond During Pendency of Writ of Review:

(Note.—The above items Nos. 12 and 13 may be omitted in printing by making suitable reference thereto.)

14. Return of Railroad Commission of California to Writ of Review (omitting pleadings, transcripts of testimony, exhibits and record and attached Memorandum of Documents filed with the Supreme Court of California);

15. Order of Supreme Court of California submitting

case for decision;

16. Decision of Supreme Court of California;

[fol. 5] 17. Petition of American Toll Bridge Company for Rehearing by Supreme Court of California;

18. Answer of Railroad Commission to Petition for Re-

hearing;

19. Order of Supreme Court of California Denying Petition for Rehearing;

20. Remittitur issued out of the Supreme Court of Cali-

fornia;

21. Petition of American Toll Bridge Company for Appeal; Assignment of Errors and Prayer for Reversal;

22. Statement of Appellant Respecting Jurisdiction of

Court to Review Judgment;

23. Order Allowing Appeal;

24. Bond of American Toll Fridge Company, approved by Chief Justice of Supreme Court of California and to operate as a supersedeas;

. 25. Citation;

(Note.—The above items Nos. 24 and 25 may be omitted in printing by making suitable reference thereto.)

26. Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm;

27. Transcript of Proceedings, Testimony and Exhibits before the Railroad Commission of the State of California:

The following portions of the transcript of proceedings, testimony and exhibits before the Railroad Commission of California:

#### (1) Transcript:

Page 2, lines 3 to 22, inclusive.

Page 3, lines 16 to 26, inclusive.

[fol. 6] Page 4, lines 12 to 26, inclusive.

Pages 5, 6, 7, 8 and 9, inclusive.

Page. 10, lines 1 to 10, inclusive.

Page 12, lines 3 to 17, inclusive.

Page 12, lines 24 to 26, inclusive.

Page 13, lines 1 to 17, inclusive.

#### (2) Exhibit No. 1:

Pages 1 to 22 (down to words "The income and . ), inclusive;

also page 25 and page 26, lines 1 and 2.

# (3) Transcript:

Page 13, lines 18 to 26, inclusive. Page 14, lines 1 to 11, inclusive. Page 30, lines 6 to 24, inclusive. Page 37, lines 2 to 5, inclusive.

### (4) Exhibit No. 3:

Pages 1 to 4, inclusive, and 8 to 27, inclusive.

### (5) Transcript:

Page 32, lines 6 to 26, inclusive. Page 33, lines 1 to 26, inclusive. Page 34, lines 1 to 10, inclusive. Page 35, lines 1 to 16, inclusive. Page 46, lines 14 to 19, inclusive. Page 62, lines 9 to 23, inclusive. Page 63, lines 5 to 8, inclusive.

#### (6) Exhibit No. 16:

Pages 1 to 13 (ending with "amounted to \$688,092.56".) [fol. 7] and 15, 16, 17 and 19, inclusive.

# (7) Transcript:

Page 63, lines 9 to 15, inclusive.

Page 63, lines 22 (beginning with "As pointed out ." to 26, inclusive.

Page 64, lines 1 to 21, inclusive.

Page 65, lines 25 and 26.

Page 66, lines 1 to 26, inclusive.

Page 67, lines 1 to 11, inclusive.

Page 67, line 23 (beginning with "A. Coming . . . . . ) to line 26, inclusive.

Pages 68, 69, 70 entire pages.

Page 71, line 1.

Page 74, lines 3 to 7, inclusive.

Page 74, lines 13 and 14.

Page 75, lines 1 to 4, inclusive.

#### (8) Exhibit No. 17:

Page 7.

### (9) Transcript:

Page 75, lines 8 to 26; inclusive. Page 76, lines 1 to 10, inclusive. Page 83, lines 9 to 24, inclusive. Page 85, lines 8 to 15, inclusive.

#### (10) Exhibit No. 19:

Map preceding page 1; pages 10, 11, 12, 13; and attached exhibit, being Ordinance No. 171 of Contra Costa County, pages 1 to 8, inclusive.

### [fol. 8] (11). Transcript:

Page 85, lines 18 to 25 (to word "Now"), inclusive.

Page 90, lines 17 to 26, inclusive.

Page 91, lines 1 to 12, inclusive.

Page 92, line 24 (beginning with "A".) to line 26, inclusive.

Page 93, lines 1 to 17, inclusive.

Page 96, lines 19 to 26, inclusive.

Page 97, lines 1 to 16, inclusive.

Page 102, lines 16 to 26, inclusive.

Page 103, lines 1 to 26, inclusive.

Page 104, lines 1 to 26, inclusive.

Page 113, lines 2 to 26, inclusive.

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Page 117, lines 8 to 26, inclusive.

Page 118, lines 1 to 26, inclusive.

Page 119, lines 1 to 26, inclusive.

Page 120, lines 1 to 24, inclusive.

# (12) Exhibit No. 22:

## Page 1.

# (13) Transcript:

Page 122, lines 3 to 26, inclusive. Page 123, lines 1 to 26, inclusive.

Page 124, lines 1 to 5, inclusive.

Page 129, lines 2 to 15, inclusive.

Page 130, lines 3 to 17, inclusive, and line 26.

[fol. 9] Pages 131, 132, 133, 134, 135, 136—all.

Page 137, lines 1 to 17, inclusive.

Page 139, line 21 (beginning with "Going back") to line 25, inclusive.

Page 140, line 1 (words "As I") to line 6, inclusive.

Page 141, lines 25 and 26.

Page 142, lines 1 to 3, inclusive.

Page 143, lines 9 to 21, inclusive.

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Page 535, lines 1 to 10, inclusive, and lines 22 to 26, inclusive.

Page 536, lines 1 to 26, inclusive.

Page 537, lines 1 to 20, inclusive.

Page 540, lines 2 to 26, inclusive.

Page 541, lines 1 to 13, inclusive.

Page 545, lines 25 and 26.

Page 546, lines 12 to 26, inclusive.

Page 547, lines 1 to 26, inclusive.

Page 548, lines 1 to 21, inclusive. Page 551, lines 10 to 26, inclusive. Pages 552, 553, 554, 555, 556—all. Page 557, lines 1 to 24, inclusive. Page 559, lines 1 to 6, inclusive. Page 560, lines 1 to 6, inclusive.

### (14) Exhibit No. 117:

Pages 26, 27, 28, 29, 30.

#### (15) Transcript:

Page 560, lines 7 to 9 (to "A."), inclusive.
Page 560, lines 15 ("I have") to 26, inclusive.
Page 561, line 1.
Page 567, lines 24 to 26, inclusive.
fol. 22] Page 568, lines 1 to 26, inclusive.
Page 569, lines 1 to 9, inclusive.
Page 569, lines 14 to 22, inclusive.

#### (16) Exhibit No. 118:

Page 573, lines 12 to 20, inclusive.

Page 25.

#### (17) Transcript:

Page 573, lines 21 to 25, inclusive.
Page 574, lines 7 to 26, inclusive.
Page 575, lines 1 to 7, inclusive.
Page 575, lines 17 to 26, inclusive.
Page 576, lines 1 to 9 (to "In"), inclusive.
Page 577, lines 2 to 10, inclusive.
Page 578, lines 5 to 26, inclusive.
Pages 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591—all.
Page 592, lines 1 to 9, inclusive.

Page 595, lines 1 to 3, inclusive.
Page 596, lines 1 to 6, inclusive.
Page 596, lines 12 to 25, inclusive.
Page 599, lines 4 to 7, inclusive.
Page 599, lines 20 to 26, inclusive.
Pages 600, 601, 602—all.
Page 603, lines 1 to 25, inclusive.

Page 605, lines 2 to 6, inclusive. Page 605, lines 11 to 20, inclusive.

[fol. 23] (18) Exhibit No. 120:

Page 4.

#### (19) Transcript:

Page 605, lines 21 to 26, inclusive. Pages 606 and 607—all. Page 608, lines 1 to 16, inclusive.

#### (20) Exhibit No. 121:

Page 4.

#### (21) Transcript:

Page 608, lines 17 to 26, inclusive. Pages 609, 610, 611—all.

Pages 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625—all.

Page 626, lines 1 to 23, inclusive.

Page 627, lines 7 to 26, inclusive.

Pages 628 and 629-all.

Page 630, lines 1 to 11, inclusive.

Page 634, lines 6 to 12, inclusive.

Page 637, lines 19 to 26, inclusive.

Page 638, lines 1 to 6 (word "deposited"), inclusive.

Page 639, lines 13 to 26, inclusive.

Page 640, line 1.

Page 641, lines 13 ("So that the") to 26, inclusive.

Page 642, lines 1 to 24, inclusive.

Page 643, lines 5 to 26, inclusive.

Page 644, lines 1 to 26, inclusive.

[fol. 24] Pages 645, 646, 647, 648—all.

Page 649, lines 1 to 17, inclusive.

Page 658, lines 11 to 26, inclusive.

Page 659, lines 1 to 13, inclusive.

Page 665, lines 7 to 26, inclusive.

Pages 666, 667, 668, 669, 670-all.

Page 671, lines 1 and 2.

#### (22) Exhibit No. 126:

Pages 1, 2, 3, 4.

#### (23) Transcript:

Page 671, lines 3 to 26, inclusive Pages 672, 673, 674, 675, 676, 677, 678, 679, 680—all. Page 681, lines 1 to 17, inclusive. Page 686, lines 3 to 26, inclusive. Page 687, lines 1 to 15, inclusive. Page 687, lines 20 to 26, inclusive. Page 688, lines 1 to 3, inclusive.

#### (24) Exhibit No. 127:

Pages 1 and 2.

#### (25) Transcript:

Page 688, lines 4 to 26, inclusive. Page 689, lines 1 to 14, inclusive. Page 690, lines 1 to 26, inclusive. Page 691, lines 1 to 17, inclusive. Page 692, lines 19 to 23, inclusive.

#### (26) Exhibit No. 128:

Page 1.

#### [fol. 25] (27) Transcript:

Page 692, lines 24 to 26, inclusive.

Page 693, lines 1 to 26, inclusive.

Page 694, lines 1 to 26, inclusive.

Page 695, lines 14 ("Now, Mr. Ready") to 19, inclusive.

#### (28) Exhibit No. 129:

Pages 1 to 5, inclusive, and Tables No. 1, 2 and 3.

#### (29) Transcript:

Page 695, lines 20 to 26, inclusive.
Pages 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706 all.

Page 707, lines 1 to 12, inclusive. Page 714, lines 23 to 26, inclusive. Page 715, lines 1 to 6, inclusive. Page 725, lines 1 to 6, inclusive.

### (30) Exhibit No. 132:

Tables 4, 5, 6, 7.

### (31) Transcript:

Page 725, lines 7 to 26, inclusive.

Pages 726, 727, 728, 729, 730, 731, 732, 733-all.

Page 734, lines 1 to 23, inclusive.

Page 735, lines 6 to 26, inclusive.

Page 736, lines 1 to 18 (to "I"), inclusive.

Page 741, lines 2 to 25 (to "I"), inclusive.

[fol. 26] Page 760; lines 15 (beginning with "My") to 26, inclusive.

Page 761, lines 1 to 18 (to "There"), inclusive.

Page 762, line 3.

## (32) Exhibit No. 134:

Pages 1, 2, 3, 4.

### (33) Transcript:

Page 762, lines 15 to 23 (to "It"), inclusive.

Page 763, lines 3 (beginning with "On") to 26, inclusive.

Page 764, lines 1 to 15 (to "Now"), inclusive.

Page 771, lines 25 and 26.

Page 772, lines 1 to 26, inclusive.

Page 773, lines 1 to 4, inclusive.

#### (34) Exhibit No. 135:

Pages 1, 2, 3.

### (35) Transcript:

Page 777, lines 13 to 18, inclusive.

Page 779, lines 4 and 5.

Page 783, lines 8 to 26, inclusive.

Page 784, lines 1 and 2.

Page 789, lines 23 to 26, inclusive.

Pages 790 and 791—alf.

Page 792, lines 1 to 14, inclusive.

#### (36) Exhibit No. 137:

Page 1.

#### (37) Transcript:

Page 792, lines 15 to 26, inclusive.
[fol. 27] Page 793, lines 1 to 26, inclusive.

Page 794, lines 1 to 18, inclusive.
Page 806, lines 24 to 26, inclusive.
Pages 807, 808, 309, 810, 811—all.
Page 813, lines 3 to 26, inclusive.
Page 814, lines 1 to 26, inclusive.
Page 815, lines 1 to 4, inclusive.
Page 816, lines 9 to 26, inclusive.
Pages 817, 818, 819, 820—all.
Page 821, lines 1 to 6, inclusive.
Page 826, lines 10 to 22, inclusive.
Page 829, lines 11 to 13, inclusive.

Page 830, lines 6 to 15 (to period after "traffic"), inclusive.

Page 831, lines 21 (from "However") to 26, inclusive.

Page 832, lines 1 and 2 and 9 to 26, inclusive.

Page 833, lines 1 to 16, inclusive. Page 834, lines 4 to 26, inclusive. Page 835, lines 1 to 26, inclusive. Page 836, lines 1 to 3, inclusive.

# (38) Exhibit No. 142:

Pages 1, 2, 3.

#### (39) Transcript:

Page 839, lines 4 to 26, inclusive. Page 840, lines 1 to 19, inclusive. Page 841, lines 17 to 26, inclusive. Page 842, lines 1 to 10, inclusive.

[fol. 28] 28. The Certificate of the Clerk of the Supreme Court of the State of California;

29. Certify separately and forward to the Clerk of the Supreme Court of the United States the following "Original Exhibits":

a. American Toll Bridge Company's Exhibits Nos. 24 and 25, being photographs respectively taken on May 10 and 15, 1923.

b. American Toll Bridge Company's Exhibit No. 26, being blueprint entitled "Proposed Highway Bridge across Carquinez Strait from Valona to Morrow Cove."

c. American Toll Bridge Company's Exhibits Nos. 27 to 103, inclusive, being photographs taken at various times between May 24, 1923 and January 6, 1925.

d. American Toll Bridge Company's Exhibits Nos. 104 and 105, being Sheets 1 and 2 of white-print entitled "Plans for Fender System at Carquinez Bridge".

e. American Toll Bridge Company's Exhibits Nos. 106 to 116, inclusive, being photographs taken at various times

between May 13, 1927 and May 12, 1929, inclusive.

f. American Toll Bridge Company's Exhibit No. 117, entitled "Reasonable Historical Cost, Carquinez Bridge, American Toll Bridge Company".

g. American Toll Bridge Company's Exhibit No. 118, entitled Reproduction of Carquinez Bridge (new), Ameri-

can Toll Bridge Company".

h. American Toll Bridge Company's Exhibit No. 119, entitled on the first page "Table 1, Summary Comparison of Interest During Construction, Carquinez Bridge".

i. American Toll Bridge Company's Exhibit No. 120, entitled "Reasonable Historical Cost, Antioch Bridge,

American Toll Bridge Company".

j. American Toll Bridge Company's Exhibit No. 121, entitled "Reproduction of Antioch Bridge (new), American Toll Bridge Company".

[fol. 29] k. American Toll Bridge Company's Exhibit No. 122, being copy of letter of April 18, 1923, from the War Department to the Company enclosing first War Department Permit of April 17, 1923.

l. American Toll Bridge Company's Exhibit No. 123, being copies of 27 letters between War Department and Department of Commerce and the Company, relating to Tem-

porary and Permanent Fender Systems.

m. American Toll Bridge Company's Exhibit No. 124, being copy of Agreement of January 24, 1925, between American Toll Bridge Company and Raymond Concrete Pile Company.

n. American Toll Bridge Company's Exhibit No. 125, being copy of letter dated January 29, 1925, from American

Toll Bridge Company to Raymond Concrete Pile Co.

o. American Toll Bridge Company's Exhibit No. 126, entitled "Estimate of Cash Requirements, by Years, for the Period from January 1, 1938 to June 30, 1948".

p. American Toll Bridge Company's Exhibit No. 127, entitled "Estimated Value, Rodeo Vallejo Ferry Company

Franchise".

q. American Toll Bridge Company's Exhibit No. 128, entitled "American Toll Bridge Company-Earning State-

ment, Martinez-Benicia Ferry and Transportation Company, 1935-1937".

r. American Toll Bridge Company's Exhibit No. 129, entitled "Cost of Money and Fair Rate of Return—American Toll Bridge Company".

s. American Toll Bridge Company's Exhibit No. 130, entitled "Distribution of Automobile Traffic—Carquinez and Antioch Bridges and Martinez-Benicia Ferry—American Toll Bridge Company".

t. American Toll Bridge Company's Exhibit No. 131, entitled "Reported and Estimated Traffic and Revenue under Present Rate—Campainez and Antioch Bridges—1926 to

1948".

u. American Toll Bridge Company's Exhibit No. 132, [fol. 30] entitled "Estimated Earnings, American Toll Bridge Company, 1926 to 1948, Present Tolls".

v. American Toll Bridge Company's Exhibit No. 133, entitled "American Toll Bridge Company—Estimated Increase in Automobile Traffic Which Would Result from Re-

duction of Tolls Suggested by J. G. Hunter".

w. American Toll Bridge Company's Exhibit No. 134, the first page being entitled "Analysis on Traffic and Revenue 1936 and 1937, Carquinez Bridge, Present Rates and Rates Proposed by J. G. Hunter".

x. American Toll Bridge Company's Exhibit No. 135, entitled "Summary of Earnings-American Toll Bridge Company-Based on Continuation of Present Rates and

also Based on Tolls Proposed by J. G. Hunter",

y. American Toll Bridge Company's Exhibit No. 136, entitled "Estimated Taxable Revenues, Deductions Therefron, and Federal Taxes Thereon, by Years, for Period from January 1, 1938 to June 30, 1948".

z. American Toll Bridge Company's Exhibit No. 142, entitled "Items of Cost of American Toll Bridge Company not Chargeable to Tolls under San Francisco-Oakland Bay Bridge Operation".

Dated at San Francisco, California, this 30th day of January, 1939.

Max Thelen, Attorney for Appellant. Ira H. Rowell, Roderick B. Cassidy, George E. Howard, Attorneys for Appellees.

[fol, 31]

ORDER

It being the opinion of the Chief Justice of the Supreme Court of the State of California that it is necessary and proper that those certain original exhibits specified in the foregoing Joint Praecipe and Stipulation for transcript of record be inspected in the Supreme Court of the United States on appeal, it is, therefore, hereby ordered that the clerk deliver such original exhibits to the Supreme Court of the United States for filing with the record in this case in connection with the transcript of proceedings therein and that after such inspection by the Supreme Court of the United States said original exhibits be returned to the clerk of the Supreme Court of the State of California.

Dated at San Francisco, California, this 1st day of Feb-

ruary, 1939.

Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 32] [File endorsement omitted]

[fol. 33] IN SUPREME COURT OF CALIFORNIA

S. F. No. 16,006

· AMERICAN TOLL BRIDGE COMPANY, a Corporation, Petitioner,

RAILEOAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield and Leon O. Whitsell, as Members of and Constituting the Railroad Commission of the State of California, Respondents

PETITION FOR WRIT OF REVIEW-Filed February 25, 1938

To the Honorable, the Supreme Court of the State of California:

Comes Now the petitioner above named and files this its petition for a writ of review and respectfully shows:

Ι

That American Toll Bridge Company, petitioner herein, at all times herein mentioned has been and now is a corpora-

tion duly organized and existing under and by virtue of the laws of the State of Delaware and engaged in the business of owning and operating two toll bridges across the Car-[fol. 34] quinez Straits and a tribuary of the San Joaquin River, as follows:

- 1. The Carquinez Bridge, between Crockett in Contra Costa County and Valona in Solano County; and
- 2. The Antioch Bridge across the San Joaquin River near Antioch, between the Counties of Contra Costa and Sacramento.

That the Carquinez Bridge was constructed and is being operated under franchise granted by the board of supervisors of Contra Costa County on February 5, 1923, which franchise will expire on or about March 5, 1948.

That the Antioch Bridge was constructed and is being operated under franchise granted by the board of supervisors of Contra Costa County on June 4, 1923, which fran-

chise will expire orkor about July 4, 1948.

That both franchises provide that upon their expiration the title to the respective toll bridges shall revert to the adjacent counties without the payment of any compensation

to the Company.

That both bridges were constructed and have been and are being owned and operated as two parts of the single transportation system of the American Toll Bridge Company, and that said bridges are located only 25 miles apart and serve in major part the same territories and the same traffic.

II

That respondent Railroad Commission of the State of [fol. 35] California is and at all times herein mentioned was a Commission organized and existing under and by virtue of the laws of the State of California and that respondents, Wallace L. Ware, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield and Leon O. Whitsell are the members of and constitute said Railroad Commission of the State of California.

#### III

That on or about August 27, 1937, said Railroad Commission made and filed its order instituting an investigation on its own motion into the operations, rates, charges, classifi-

cations, rules, regulations, contracts and practices, or any thereof, of the privately owned toll bridges across San Francisco Bay, specifically including both the Carquinez and the Antioch Bridges of said American Toll Bridge Company, and set a hearing in said matter for October 26, 1937, a copy of which order is annexed hereto, marked Exhibit "A" and made a part hereof.

That on or about October 4, 1937, said Railroad Commission made and filed an order instituting an investigation on its own motion into the rates, charges, contracts, classifications, fules and regulations of American Toll Bridge Company, confined to said Company's operations over said Carquinez Bridge, and set a hearing in said matter for said October 26, 1937, a copy of which order is annexed hereto, marked Exhibit "B" and made a part hereof.

[fol. 36] IV

That thereafter, on October 26, December 2, 3, 21, 22 and 23, 1937 and January 18, 19 and 28, 1938, hearings were had before said Railroad Commission in said matters, at which hearings testimony was presented by said Railroad Commission and your petitioner.

#### V

That thereafter, and on February 8, 1938, said Railroad Commission made and filed its opinion and order in said matter, copy of which is attached hereto, marked Exhibit "C" and made a part hereof.

#### VI

That thereafter, on the 17th day of February, 1938, being more than 10 days before the effective date of said decision and order, this petitioner filed with said Railroad Commission a petition for a rehearing in said matter, a copy of which said petition is attached hereto, marked Exhibit "D" and made a part hereof.

#### VII

That thereafter, and on February 21, 1938, said Railroad Commission made its order denying said petition for rehearing, a copy of which said order is attached hereto, marked Exhibit "E" and made a part hereof.

#### VIII

That said decisions and orders of said Railroad Commission made on February 8, 1938 and February 21, 1938 [fol. 37] were and are and each thereof was and is unlawful for each of the reasons set forth in said petition for rehearing (Exh. "D" hereto), to which petition reference is hereby made for a more particular statement of the same.

#### IX

That said order and decision of said Railroad Commission made on February 8, 1938, and also said order and decision of said Railroad Commission made on February 21, 1938, are, and each of them is, erroneous and contrary to law for each of the following reasons, among others:

- 1. Said decisions and orders and each of them violate the rights of petitioner under Section 1 of Article XIV of the Amendments to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of the State of California because in fixing the tolls to be charged by petitioner for automobiles and passengers on foot or in vehicles moving over said Carquinez Bridge, said Railroad Commission omitted substantial items of property of petitioner used and useful in its business of owning and operating said Carquinez Bridge, also made erroneously low allowances for other items of property so used, also failed to make any allowance for the cost of developing the business or going concern value, also fixed an erroneously low figure as representing the fair value of petitioner's property so used, also fixed a rate of return far below the actual cost of money used by petitioner in the [fol. 38] construction of said Carquinez Bridge, also fixed tolls which will not yield to petitioner a fair return on the fair value of its properties used and useful in the public service of owning and operating said Carquinez Bridge.
- 2. Said decisions and orders, and each of them, violate the rights of petitioner under Section 1 of Article XIV of the Amendments to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of the State of California because said Railroad Commission picked said Carquinez Bridge out from petitioner's single and unified transportation system, consisting of both the Carquinez and the Antioch Bridges, and fixed tolls for

the Carquinez Bridge alone, which is the more profitable portion of petitioner's said single and unified transportation system, and by thus excluding from said decision and order said Antioch Bridge, arbitrarily, unfairly and unjustly fixed tolls which, when applied to both bridges as they necessarily and inevitably must be, will deprive petitioner of a fair return upon the fair value of the property devoted by it to its single, unified transportation system consisting of the Carquinez and the Antioch Bridges.

- 3. Said decisions and orders, and each of them, violate the rights of petitioner under Section 1 of Article XIV of the Amendments to the Constitution of the United States [fol. 39] and Sections 13 and 14 of Article I of the Constitution of the State of California for the reasons that in this case of "wasting assets" the property in which will be necessarily and irretrievably lost to petitioner at the expiration of its franchise in 1948, the Railroad Commission fixed said tolls so low that they will necessarily and inevitably fail in the sum of at least \$2,841,767.00 to yield to petitioner sufficient revenues to enable petitioner to meet the principal and interest of its bonds and to retire its capital stock at par with reasonable dividends.
- 4. Said decisions and orders, and each of them, violate Paragraph 1 of Section 10 of Article I of the Constitution of the United States, Section 16 of Article I of the Constitution of California, the Act of March 14, 1881 of the Laws of California and Sections 2845 to 2848, inclusive, and Section 2872 of the Political Code of the State of California because said decisions and orders impair the obligation of petitioner's contract with the State of California, under which contract the State, acting through the Board of Supervisors of Contra Costa County, contracted with the grantees of the franchises for the construction and operation of the Carquinez and the Antioch Bridges that during the term of 20 years after the granting of said franchises the public authorities would not reduce the tolls set forth in the ordinance granting said franchises unless the Board of Supervisors should first have found that said tolls were vielding to the Toll Bridge Company a rate of return in [fol. 40] excess of 15% on the actual cost of the construction or erection of said bridges and such additional income as will provide for the annual cost of operation, maintenance, amortization and taxes of said bridges.

- 5. Said decisions and orders, and each of them, were made on the assumption by the Railroad Commission that the Carquinez Bridge is fairly comparable with the two publicly owned and operated San Francisco Bay bridges and that the tolls charged over the Carquinez Bridge could be fixed as low as those charged by the two San Francisco Bay bridges, which assumed analogy is false and grossly unfair to petitioner.
- 6. Said decisions and orders, and each of them, are arbitrary, unjust and unreasonable and violate the rights of petitioner under the Constitutions of the United States and of California and the statutes of California for each other reason which is specified in petitioner's said petition for rehearing before said Railroad Commission (Exh. "D" hereto).

X

That this is a proceeding in which petitioner has challenged and does challenge the validity of said orders and decisions of the Railroad Commission on the specific ground, among others, that said decisions and orders, and each of them, violate the rights of petitioner under the Constitution of the United States, namely, under Section 1, Article [fol. 41] XIV, of the Amendments to said Constitution and under Paragraph 1, Section 10 of Article I of said Constitution, and in which proceeding it is, of course, the duty of this Court to exercise an independent judgment on the law and the facts and in which the findings or conclusions of the Railroad Commission material to the determination of the said constitutional questions shall not be final, all as provided in the Laws of California, St. 1933, ch. 442, pp. 1157-8.

#### XI

That unless the operation and enforcement of said decisions and orders of the Railroad Commission be stayed and suspended before, during and after the hearing upon petitioner's application upon notice for an order suspending the operation of the Commission's said decisions and orders throughout the pendency before this Court of the writ of review herein prayed for, great, irreparable and immediate damage will result to your petitioner in that if petitioner is required to collect the lower tolls fixed by the Railroad Commission, as aforesaid, for the transportation of auto-

mobiles and passengers on foot or in vehicles over the Carquinez Bridge, as aforesaid, during the pendency of said writ of review, or during any of said time, and if said Court should thereafter decide that the Railroad Commission's said decisions and orders were and are unlawful and should set the same aside, then petitioner would be [fol. 42] unable to collect from any of the parties who paid said reduced tolls the difference between petitioner's tolls for said services heretofore and now in effect and said reduced tolls fixed by the Railroad Commission, all of which money would be irretrievably lost to petitioner, and that said injury, loss and damage would be immediate and irreparable before notice can be served and hearing had upon petitioner's motion for a stay of said orders and decisions upon 5 days' notice as provided in Section 68(b) of the Public Utilities Act of the State of California, as amended (St. 1933, eh. 442, pp. 1157, 1158).

That said matters are set forth in greater detail in the affidavit of Will F. Morrish, president of American Toll Bridge Company, filed herewith, to which affidavit reference is hereby made for further particulars.

#### XII.

That petitioner offers to file in connection both with a temporary stay and with a stay or suspension after notice during the pendency of said writ of review before this Court, a suspension bond or bonds in such form and amount or amounts as this Court may approve.

That petitioner offers to keep, in connection both with said temporary stay and said stay and suspension after notice and hearing, such records and accounts, verified by oath, as may, in the judgment of this Court, show the amount to be charged or received by petitioner in excess of [fol. 43] the charges allowed by said decisions and orders of the Railroad Cournission, together with the names and addresses of the corporations and persons to whom overcharges will be refundable in the event that said orders and decisions of the Railroad Commission are upheld.

Wherefore, petitioner prays that a writ of review be granted by this Court requiring the Railroad Commission of the State of California to certify fully to this Court, at a specified time and place to be designated by this Court, the transcript of the records and proceedings of said Rail-

road Commission taken and had in said proceedings hereinbefore described in order that said decisions and orders of said Railroad Commission, and each of them, may be reviewed by this Court and that upon a review thereof such orders and decisions, and each of them, may be annulled, set aside and adjudged void and of no effect for the reasons herein mentioned; that this Court grant an immediate temporary stay restraining the operation of the Railroad Commission's said decisions and orders, such temporary stay to remain in effect until the hearing and determination by this Court of petitioner's application upon notice for a stayand suspension during the pendency of the writ of review before this Court; that thereafter, on said hearing, this Court make its order staying and suspending the operation of the Railroad Commission's said decisions and orders [fols. 44-45] during the pendency of said writ of review; and for such other and further relief as may be meet and proper in the premises.

Dated February 25, 1938.

Thelen & Marrin, by Max Thelen, Balfour Building, San Francisco, California. Dunn, White & Aiken, by B. R. Aiken, and Bauer E. Kramer, Syndicate Building, Oakland, California. Breed, Burpee & Robinson, by Harold C. Holmes, Jr., Financial Center Building, Oakland, California, Attorneys for Petitioner.

[fcl. 46]

EXHIBIT "A" TO PETITION

Before the Railroad Commission of the State of California

Case No. 4244

In the Matter of the Investigation, on the Commission's Own Motion, into the Operations, Rates, Charges, Classifications, Rules, Regulations, Contracts and Practices, or any Thereof, of American Toll Bridge Company, San Francisco Bay Toll Bridge Company and Dumbarton Bridge Co., Toll Bridge Corporations, as Defined by Statutes 1937, Chapter 896

By the Commission:

ORDER INSTITUTING INVESTIGATION

It appearing that American Toll Bridge Company, a corporation, San Francisco Bay Toll Bridge Company, a corpo-

ration, and Dumbarton Bridge Co., a corporation, are engaged respectively, as toll bridge corporations, as defined by Section 2(ee). Public Utilities Act. (added by Statutes 1937, Chapter 896), in owning, controlling, operating and managing certain bridges and appurtenances thereto used for the transportation of persons and property, for compensation, as follows:

Office Address Bridge

American Toll Bridge Company

American Toll Bridge

Company San Francisco Bay Toll

Bridge Company

Dumbarton Bridge Co.

Vallejo, Calif. Carquinez

Vallejo, Calif. Antioch

San Mateo, Calif. San Mateo 505 Crocker Bldg., Dumbarton San Francisco. California.

[fol. 47] And it further appearing that an investigation

should be insituted by the Commission, on its own motion. concerning said toll bridge corporations and each of them. as hereinafter provided:

Now, therefore, good cause appearing,

· It Is Hereby Ordered that an investigation be and it is hereby instituted by the Commission, on its own motion. into the operations, service, rates, tolls, rentals, charges. classifications, rules, regulations, contracts, practices, privileges and facilities, or any thereof, established, charged. assessed, collected and enforced, or to be established. charged, a sessed, collected and enforced, by American Toll Bridge Company, a corporation, San Francisco Bay Toll Bridge Company, a corporation, and Dumbarton Bridge Co., a corporation, toll bridge corporations respectively, as defined by Section 2(ee). Public Utilities Act. (added by Statutes 1937, Chapter 896), respondents herein, in connection with and relating to the operation and maintenance by said respondents, respectively, of the said bridges and the appurtenances thereto, for the purpose of:

(a) determining whether or not the rates, tolls, rentals. charges and classifications established, charged, assessed. collected and enforced, or to be established, charged, assessed, collected and enforced, by said respondents, and each of them, for the transportation of persons and property for [fol. 48] compensation over the said bridges operated by said respondents respectively, together with all rules, regulations, contracts, practices, privileges and facilities which may in any manner affect or relate to said rates, tolls, rentals, charges and classifications, were, are, or for the future will be unjust, unreasonable, unduly discriminatory, preferential or prejudicial; and

(b) establishing such rates, tolls, rentals, charges and classifications, together with all rules, regulations, contracts, practices, privileges and facilities affecting or relating to the same, or any thereof, for the transportation by said respondents, and each of them, of persons and property for compensation over the said bridges overated by said respondents respectively, as may be found to be just, reasonable, non-discriminatory, non-preferential, and non-prejudicial.

It is Hereby Further Ordered that a public hearing be had in the above entitled matter before Commissioner Riley in the Court Room of the Railroad Commission, State Building, San Francisco, California, at 10:00 b'clock, A. M., on Tuesday, the 26th day of October, 1937.

It is Hereby Further Ordered that said American Toll Bridge Company, San Francisco Bay Toll Bridge Company [fol. 49] and Dumbarton Bridge Co., be and they are hereby made respondents, and each of them is hereby made a respondent, to this proceeding; and the Secretary of the Railroad Commission is hereby authorized and directed to cause service of this order to be made upon said respondents, and each of them, not later than ten (10) days before the date of said hearing.

Dated at San Francisco, California, this 27th day of August, 1937.

Wallace L. Ware, Leon O. Whitsell, Frank R. Devlin, Ray C. Wakefield, Ray L. Riley, Commissioners.

Certified as a True Copy.

H. G. Mathewson, Secretary, Railroad Commission, State of California. [fol. 50] Exhibit "B" to Petition

#### BEFORE THE RAILBOAD COMMISSION OF THE STATE OF CALIFORNIA

#### Case No. 4259

In the Matter of the Investigation upon the Commission's Own Motion, into the Rates, Charges, Contracts, Classifications, Rules and Regulations of American Toll Bridge Company Covering Its Operation of the Toll Bridge Over the Carquinez Straits Between the Counties of Contra Costa and Solano

By the Commission:

#### ORDER INSTITUTING INVESTIGATION

The Commission heretofore having instituted an investigation into the rates and practices of the American Toll Bridge Company and of other corporations operating toll bridges, and it appearing proper that a separate proceeding be instituted to inquire into the reasonableness of the tolls charged upon the Carquinez bridge, therefore, good

cause appearing,

It Is Ordered that an investigation be instituted upon the Commission's own motion into the reasonableness of the rates, charges, contracts, classifications, rules and regulations, or any thereof, now charged or enforced by American Toll Bridge Company in the operation of that toll bridge over the Carquinez Straits between the Counties of Contra Costa and Solano, or which reasonably may be charged or enforced by said corporation in the operation of said toll bridge.

[fol 51] It Is Hereby Further Ordered that a public hearing be had upon said investigation before Commissioner Riley in the Courtroom of the Commission, State Building, San Francisco, California, at 10 o'clock A. M. on Tuesday, October 26, 1937, and that the Secretary be directed to cause a copy of this order to be served upon American Toll Bridge Company at least ten (10) days prior to the date of said hearing.

Dated, San Francisco, California, October 4th, 1937.

Wallace L. Ware, Leon O. Whitsell, Frank R. Devlin, Ray C. Wakefield, Ray L. Riley, Commissioners.

Certified as a True Copy.

H. G. Mathewson, Secretary, Railroad Commission, State of California.

# [fol. 52]

# . EXHIBIT "C" TO PETITION

#### Decision No. 30612

# BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

#### Case No. 4259

In the Matter of the Investigation upon the Commission's Own Motion, into the Rates, Charges, Contracts, Classifications, Rules and Regulations of American Toll Bridge Company Covering Its Operation of the Toll Bridge Over the Carquinez Straits Between the Counties of Contra Costa and Solano

Dunn, White & Aiken, by Ben R. Aiken; Breed, Burpee & Robinson, by Harold C. Holmes, Jr.; and Thelen & Marrin, by Max Thelen, for the American Toll Bridge Company.

Brobeck, Phleger & Harrison, by James S. Moore, for the

Dumbarton Bridge Company.

Orrick, Palmer & Dahlquist, by George Herrington, and Garret McEnerney, for the San Francisco Bay Toll Bridge Company.

John J. O'Toole, City Attorney, and Dion R. Holm, Assistant City Attorney, for the City and County of San

Francisco.

R. L. Chamberlain, for the Attorney General of the State of California.

W. Johnson, for T. M. Carlson, City Attorney of the City of Richmond, for the City of Richmond.

Louis Purcell, for the Crockett Signal:

Nathan F. Coombs and Charles Gray, for the Napa Chamber of Commerce.

Edwin G. Wilcox and Walter A. Rohde, for the San Francisco Chamber of Commerce.

Harry A. Barnes, for the Martinez Chamber of Com-

Irvin B. Wright, for the California State Chamber of Commerce.

N. E. Keller, for the Pacific Portland Cement Company.

J. B. Costello, for the Sperry Flour Company.

[fol. 53] C. C. Carleton, for the California Toll Bridge
Authority.

C. C. Carleton, by Robert E. Reed and Frank B. Durkee, for the Department of Public Works of the State of California.

Henry Sweet, for the San Leandro Chamber of Commerce.

Frank O. Bell, for the Vallejo Chamber of Commerce.

- · P. M. Sanford, for the Richmond Chamber of Commerce.
- J. Jorgensen, for the Pittsburg Chamber of Commerce.
- T. H. Wilson, for the Sonoma Valley Chamber of Commerce.

William L. Bush, for the Contra Costa County Development Association.

W. B. Stafford, for the Antioch Chamber of Commerce.

T. G. Differding, for the Oakland Chamber of Commerce.

#### RILEY, Commissioner:

#### OPINION

In this proceeding, instituted by the Commission on its own motion, the Commission is called upon for the first time to determine the reasonableness of rates charged by this toll-bridge corporation.

By Chapter 896, Statutes of 1937, effective August 27, 1937, the Public Utilities Act of the State of California was amended so as to include toll-bridge corporations as public utilities subject to regulation by the Railroad Commission. Sections 2(dd) and 2(ee), as amended by Chapter 896, [fol. 54] Statutes of 1937, read—

- (dd) The term "public utility", when used in this act, includes every common carrier, toll-bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof. (Amended 1937, ch. 896.)
- (ee) The term "toll-bridge corporation", when used in this act, includes every private corporation or private person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any bridge or appurtenance thereto, used for the transportation of persons or property for compensation in this State. (Added 1937, ch. 896.)

# The Proceeding:

This case involves the rates charged by the American Toll Bridge Company for traffic over its so-called Carquinez Bridge.

The proceeding is unique in the history of regulation by this Commission of the affairs of public utilities under its jurisdiction. It differs from other rate proceedings heretofore conducted by the Commission in that there is involved in this case a public utility whose operating life as such will terminate on or about March 5, 1948, the date of the expiration of the franchise under which it conducts its operations. On that date the possession of the properties will pass from the company to the Counties of Contra Costa and Solano, without compensation to the company. Furffol. 55] there, here is involved a utility which was organized and for more than half its franchise 're, has conducted its operations outside the jurisdiction of this Commission. For these reasons it would seem that a departure from the usual methods and procedure is warranted.

When Chapter 896 became effective the Commission on its own motion instituted a general investigation, Case No. 4244, into the affairs of all toll-bridge companies thus placed under its jurisdiction. An initial hearing was held in both cases on October 26, 1937, at which time Case No. 4244 was dropped temporarily from the calendar, thus leaving for consideration and determination the issues presented in Case No. 4259.

At the outset, counsel for American Toll Bridge Company, which, in addition, owns and operates a toll bridge, hereinafter referred to as the Antioch Bridge, across the San Joaquin River between a point near Antioch, Contra-Costa County, and Sacramento County, entered a motion, for both proceedings, so far as American Toll Bridge Company is concerned, to be consolidated for hearing and decision, so that the rates of both Antioch and Carquinez Bridge might be considered at this time. While it is true that in the development of the record in Case No. 4259 considerable evidence and testimony was introduced relating to the so-called Antioch Bridge, it has been decided to limit this decision and the order herein to Case No. 4259, namely, to [fol. 56] the operation of the Carquinez Bridge of the

American Toll Bridge Company, hereinafter sometimes re-

ferred to as the respondent.

Accordingly, the motion of counsel for respondent will be denied. However, in fixing rates in this decision for certain traffic over the Carquinez Bridge, consideration will be given to the effect of such rates on the company as a whole.

#### Historical Review:

In order that a complete picture might be presented of the bridge operations under review, a brief historical reference should be made.

It appears that on February 5, 1923 a 25-year franchise (Ordinance No. 171) was granted by the Board of Supervisors of Contra Costa County to Rodeo-Vallejo Ferry Company 1 providing for the construction and operation of the Carquinez Bridge. Thereafter, those in control of the affairs of Rodeo-Vallejo Ferry Company, on or about May 28, 1923, caused the organization of American Toll Bridge Company, respondent herein, and on July 2, 1923 caused the transfer to it of the rights to construct and operate the bridge. Said ordinance contains the following provision:

"It Is Hereby Ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the councies of Contra Costa and Solano".

Also on July 2, 1923 were transferred to respondent the [fol. 57] rights to construct and operate the Antioch Bridge which previously had been acquired by Delta Bridge Corporation 2 by a 25-year franchise granted by the Board of Supervisors of Contra Costa County on June 4, 1923.

Construction work was started on the Carquinez Bridge during April 1923 and on the Antioch Bridge during March, 1924. The Antioch Bridge was opened to traffic on January

<sup>&</sup>lt;sup>1</sup> Rodeo-Vallejo Ferry Company at that time was engaged in operating ferries as a public utility between Shortway, Contra Costa County, and Morrow Cove, Solano County.

<sup>&</sup>lt;sup>2</sup> Delta Bridge Corporation was organized under the laws of the State of California on or about December 21, 1922. Its outstanding stock (\$500 par value) was acquired by respondent on July 2, 1923.

1, 1926 with temporary approach roads which were not completed until July 1927. The Carquinez Bridge was opened to traffic on May 21, 1927 with a temporary fender system at the base of the center pier. The permanent fender was completed during December 1930.

The respondent company in addition to the two bridges now holds all the outstanding stock of the Rodeo-Vallejo Eerry Company, which at present owns certain water frontlands and other real estate and improvements, and all the outstanding stock of Martinez-Benicia Ferry and Transportation Company, a corporation owning and operating ferries as a public utility between Martinez and Benicia. It also owns approximately 368,000 shares of stock of American Toll Bridge Company of California.

# [fol. 58] Financing of Properties:

Respondent was organized under the laws of the State of Delaware on or about May 28, 1923 with an authorized capital stock of \$5,000,000 divided into 5,000,000 shares of the par value of \$1.00 each, all of one class. At the same time there was organized, also under the laws of the State of Delaware, a separate corporation named American Toll Bridge Company of California, hereinafter referred to as the holding company.

An examination of respondent's records shows that on, July 2, 1923 it issued all of its authorized capital stock, except \$1,000 previously issued to its incorporators, to the holding company, in exchange for stock of Rodeo-Vallejo Ferry Company and Delta Bridge Corporation, and for. certain real estate, contracts and franchise. The record shows that the holding company in receiving the stock of respondent agreed to donate \$1,000,000 of such stock back to respondent and to sell'\$1,500,000 thereof and to donate the receipts to respondent. It appears the plans of those in control of the two corporations called for the public sale of these two blocks of stock at a price of \$2 a share, although the par value was \$1.00 a share, and the use of forty cents for each share sold to pay commissions, as permitted by the Commissioner of Corporations, leaving a net [fol. 59] price to the company of \$1.60 a share.

Although some stock was sold at \$2.00 a share, the company did not sell all of the \$2,500,000 to the public, as orig-

inally planned. In December of 1925 it issued and sold, at 90, \$4,500,000 of first mortgage 7% bonds and \$2,000,000 of second mortgage 8% bonds to complete the cost of its construction. Both issues were dated as of April 1, 1925, maturing on April 1, 1945. Up to the middle of 1935 the company had reduced its capital stock to \$3,719,593 and its bonded debt to \$4,180,000. During 1935 it refunded its then outstanding seven and eight percent bonds through the issue of \$4,300,000 of first mortgage 5.5% bonds. The increase in the bonded debt was made in order to provide in part the cost of calling the then outstanding bonds and to pay expenses incident to the issue of the new bonds. The latter issue has been reduced to \$3,491,500 as of October 31, 1937.

The record shows the company's reported investment in its Carquinez Bridge structure, exclusive of lands, at [fol. 60] \$7,863,451.17. It appears that the company's earnings, over the period of its existence, have been sufficient to enable it to set up a reserve for depreciation of the Carquinez Bridge of \$2,748,443.34 and other reserves of \$1,055,313.48, and to accumulate a surplus of \$419,123.92, as of October 31, 1937.

#### Revenues:

A complete record has been developed of the revenues and expenses of the company since the inception of its operations up to October 31, 1937.

Exhibits filed in the proceeding show the operating revenues and the net operating revenues after deducting operating expenses, local taxes and an allowance for depreciation, for the Carquinez Bridge, as reflected in the company's books as follows:

<sup>&</sup>lt;sup>3</sup> In addition to the outstanding stock there is stock in the amount of \$57,280, represented by the reserve for contingencies, which is subject to re-issue. If and when such stock is re-issued the total amount outstanding will be increased to \$3,776,873.

<sup>&</sup>lt;sup>4</sup> The reserve has been accumulated on the 6% sinking fund method based on the operating life of the bridge under the franchise which is designed to return the cost of the bridge upon the expiration of the franchise.

	Period .	Corporate Revenue	Net Operating Revenue
1927	(from May 21)	\$637,658.97	\$272,777.07
1928		986,570.91	339,601.72
1929	***************************************	1,081,306.90	599,857.05
1930	*	1,193,727.47	714,558.05
1931		1,152,297.04	632,972.74
1932		975,911.13	460,730.17
1933		917,117.25	395,716.84
1934		959,228.97	448,091.77
1935		1,061,172.77	484,420.61
1936		1,306,191.01	739,908.00
1937	(to October 31)	1,311,553.21	759,156.15

#### [fol. 61] Cost of Properties:

A considerable amount of evidence and testimony was received of the cost or value of the bridge properties. The various figures and conclusions may be summarized as follows:

Book cost of bridge structure (Exhibit 1)	\$7,863,451
Estimated reasonable cost of construction (Ex-	
hibit 16)	6,877,318
Cost to reproduce new (Exhibit 16)	6,340,844
Original cost (Exhibit 117):	,
Bridge structures \$7,863,451	
Land 66,835	
Furniture and fixtures 19,668	
	7,949,954
Adjusted original cost (Exhibit 117)	8,332,622
Reasonable historical cost (Exhibit 117)	8,139,307
Reproduction cost new (Exhibit 118)	8,743,231

However, there are included in the book costs certain items which appear to be more properly chargeable to other than capital accounts and certain items concerning which no information was available, approximating \$375,000. Further, the book figure includes certain expenditures for organization purposes whose reasonableness might well be questioned.

#### Estimated Revenue:

The company's schedule of rates at present provides for a toll of 60¢ per car and 10¢ per passenger.

Estimates of future revenue and traffic, based on an assumed toll of  $50\phi$  per car and five passengers and  $5\phi$  for other passengers were placed into the record by witnesses for the Commission and the respondent.

In Exhibit 23 the Commission's witness estimated that with such a revision in the rates the volume of traffic dur[fol. 62] ing 1937 would have been increased 13.5% and that such an increase, based on the 1937 traffic, would have produced for 1937 an amount available for return on investment of \$551,946.

In Exhibit 134 the respondent's witness estimated that with the same revision in rates an induced traffic of 11% might be expected which should produce for the year 1938 from the operation of the Carquinez Bridge a net income, before allowances for federal income and state franchise taxes, of \$629,799. An allowance for these items, based on the estimated revenue for 1938, would produce a net amount during 1938 available for return of approximately \$575,000. At the closing hearing in this matter, however, this witness modified his estimates and concluded that an increase of 13.5% might be expected which would produce an average annual income of approximately \$14,550 in excess of that appearing in his exhibit, bringing the total estimated net return up to approximately \$590,000.

A reduction in rates will stimulate the traffic over the bridge, although the extent, of course, cannot be estimated with exactitude. The results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure. When tested upon the bases usually followed by the Commission such a rate of return is reasonable for this particular company, consid-[fol. 63] ering the unusual circumstances under which its properties were constructed and have been and are operated. However, for the time being, in order that the company may be assured of financial stability and to guard against possible inaccuracies in the estimate of induced traffic, by reason of rate reductions, a rate slightly higher than that proposed should be authorized.

Accordingly, I am of the opinion that a toll of 45¢ per car and of 5¢ for each passenger should be authorized for operations over the Carquinez Bridge. Such a rate should enable the company to meet its requirements under its trust indenture and amortization and dividend requirements.

In making this order, I wish to place respondent upon notice that the Commission may in the future reopen this proceeding when experience has developed further data of traffic moving over the bridge under the proposed rates. The truck, freight and other rates now appearing in the company's schedule of charges will have consideration in Case No. 4244. This order is not intended to change, or to be construed as approving, such other rates.

I herewith submit the following form of order:

#### Order

Public hearings having been held in the above entitled matter and the Railroad Commission having given full and [fol. 64] careful consideration to the record before it and being of the opinion that the present rates of American Toll Bridge Company, referred to in this order, are unjust and unreasonable insofar as they differ from the rates herein prescribed which are hereby found to be just and reasonable rates, therefore,

It Is Hereby Ordered that American Toll Bridge Company shall file with the Commission, effective on and after March 1, 1938, a supplement to its tariff heretofore filed with the Commission on September 1, 1937 so as to change the items in its schedule of charges reading as follows:

Passengers	(7	years	of	age	and	older)	on foot	or in	
vehicles									\$.10
Auto only						.,			.60

#### so as to read-

Passengers	(7	years	of	age	and	older) on	foot or in	
vehicles						(9)		.05
Auto only						A		.45

It Is Hereby Further Ordered that American Toll Bridge Company shall, on or before the 25th day of each month, file with the Commission a report showing its balance sheet as of the close of the preceding month, an income and profit and loss statement for the preceding month, together with a detailed statement of revenues and expenses, and a statement of the traffic moving over each bridge, segregated so as to show the number of automobiles, the number of passengers, the number and classification of trucks, the tonnage of [fol. 65] freight and the number and kinds of other vehicles, together with the gross revenue from each class of traffic.

It Is Hereby Further Ordered that unless otherwise directed, the order herein shall become effective twenty (20) days from the date hereof.

The foregoing Opinion and Order are hereby approved and ordered filed as the Opinion and Order of the Railroad

Commission of the State of California.

Dated at San Francisco, California, this 8th day of February, 1938.

Wallace L. Ware, Frank R. Devlin, Ray L. Riley, Commissioners.

Certified as a True Copy.

H. G. Mathewson, Secretary, Railroad Commission, State of California.

# [fol. 66] Exhibit "D" to Perition

BEFORE THE RAILEOAD COMMISSION OF THE STATE OF CALIFORNIA

#### Case No. 4259

In the Matter of the Investigation upon the Commission's Own Motion, into the Rates, Charges, Contracts, Classifications, Rules and Regulations of American Toll Bridge Company Covering Its Operation of the Toll Bridge Over the Carquinez Straits Between the Counties of Contra Costa and Solano

PETITION OF AMERICAN TOLL BRIDGE COMPANY FOR REHEARING

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#### [fol. 66-1] Before Railroad Commission of the State of California

#### Case No. 4259

PETITION OF AMERICAN TOLL BRIDGE COMPANY FOR REHEARING

American Toll Bridge Company herewith respectfully applies to the Railroad Commission of the State of California for a rehearing on said Commission's Decision and Order of February 8, 1938 in the above-entitled matter.

I

#### Introduction

American Toll Bridge Company owns and operates two toll bridges across the same water barrier, namely, the [fol. 66-2] Carquinez Straits and the San Joaquin River, as follows:

- 1. The Carquinez Bridge, between Crockett in Contra Costa County and Valona in Solano County;
- 2. The Antioch Bridge, across the San Joaquin River near Antioch between the counties of Contra Costa and Sacramento.

The franchise for the Carquinez Bridge was granted by the Board of Supervisors of Contra Costa County on February 5, 1003, and will expire on or about March 5, 1948.

The franchise for the Antioch Bridge was granted by the Board of Supervisors of Contra Costa County on June 4, 1923, and will expire on or about July 4, 1948.

Both franchises provide that upon their expiration the title to the toll bridge shall revert to the adjacent counties without the payment of any compensation to the Company.

Hence, only slightly in excess of ten years remain before American Toll Bridge Company will lose its property in both bridges.

It is this feature which makes the case a particularly serious one to the Company. If the Company's tolls are now cut too deeply, the Company probably can never make up the loss and will be unable to meet its obligations to its bondholders and stockholders.

The Carquinez and the Antioch Bridges have been and are owned and operated as two parts of the single trans-

[fol. 66-3] portation system of American Toll Bridge Company. These bridges are located only 25 miles apart and serve in major part the same territories and the same traffic.

The Carquinez Bridge is now being operated at a modest profit but the Antioch Bridge is being operated in the red.

The Commission has chosen to fix tolls for the Carquinez Bridge alone. This action has apparently been taken in the belief that the Commission can cut much deeper into the existing tolls if it considers the Carquinez Bridge alone than though it fixed rates for both bridges of this single transportation system.

In the present proceeding, the Commission has reduced tolls for the Carquinez Bridge alone from 60¢ per automobile plus 10¢ per passenger to 45¢ per automobile plus 5¢ per passenger. The record shows an average of 2.2 passengers per automobile. Accordingly, the Commission's reduction is from an average of 82¢ per automobile and passengers to 56¢, being a reduction of 26¢ per average automobile and passengers.

This is a reduction of 31.7%.

On the last page of its Decision, the Commission holds out the threat or the promise of further loss of revenue by reductions in the Company's freight rates.

The Company now sets forth specifically each of the following matters as ground or grounds on which it considers [fol. 66-4] the Commission's Decision to be unlawful:

#### H

# Exclusion of Antioch Bridge

# 1. The Facts

On August 27, 1937, the Railroad Commission, on its own motion, in Case No. 4244, instituted an investigation into the rates, rules and regulations of American Toll Bridge Company, San Francisco Bay Toll Bridge Company and Dumbarton Bridge Co., owning and operating toll bridges across the waters of San Francisco Bay. The Order specifically mentioned both the Carquinez and the Antioch Bridges of American Toll Bridge Company.

Thereafter, on October 4, 1937, the Commission, in Case No. 4259, instituted another investigation into the rates, rules and regulations of American Toll Bridge Company

alone and confined to the operation of the Carquinez Bridge.

The initial hearing in both Cases was thereafter set for October 26, 1937. At that time, counsel for American Toll Bridge Company made a formal motion to consolidate Cases 4244 and 4259 for hearing and decision, in so far as American Toll Bridge Company is concerned, so that the Commission would make its ruling on the rates, rules and regulations to be charged for transportation over both the Carquinez and the Antioch Bridges. (Tr. 4-9.)

In support of his motion, counsel pointed out that American Toll Bridge Company owns and operates both the Car-[fol. 66-5] quinez and the Antioch Bridges and also, through a subsidiary, the Martinez-Benicia Ferry; that the franchises for both the bridges were granted early in 1923 and that in each case the franchise runs until 1948; and that each franchise provides that at its termination the property of the toll bridge shall revert to the adjacent counties

without charge.

Counsel further pointed out that both the Carquinez and the Antioch Bridges were financed and constructed and are owned and operated by the same company; that they both ross the same water barrier, that is, the Carquinez Straits and the San Joaquin River, at points which are only about 25 miles apart, and that the Martinez-Benicia Ferry operates across the Carquinez Straits at a point about 8 miles East of the Carquinez Bridge; that both of the bridges serve substantially the same territory, that is, the San Francisco Bay territory on the South and the Sacramento Valley and the Counties of Sonoma, Solano, Napa and Lake on the North; and that although certain of the traffic is peculiar togethe one or the other of the two bridges, they are, as far as the major traffic is concerned, distinctly competitive.

Counsel also pointed out that the operations of the Antioch Bridge have been less satisfactory, financially, than the operations of the Carquinez Bridge, and that if the rates of the Carquinez Bridge are considered alone without regard to the earnings of the combined system, an injustice would inevitably be done to American Toll Bridge Com-

pany and to the service which it renders.

[fol. 66-6] The Commission did not then rule on the motion but took the same under advisement. (Tr. 10.)

In its Decision herein, the Commission, without giving any reason for its action, denied this motion. The Commission merely said that "it has been decided" to limit its

decision and order to the Carquinez Bridge. (Decision, pages 3-4.)

The Decision shows on its face that in determining the tolls to be charged for transportation of automobiles and passengers over the Carquinez Bridge, the Commission confined its consideration to that bridge alone. After making certain preliminary observations, which do not enter into the computation of the rate, the Commission, on pages 8-9 of the Decision, proceeds to work out the rate. All the figures there referred to by the Commission are figures relating exclusively to the Carquinez Bridge. No figure there shown, whether it relates to a fair rate basis or to revenues or operating expenses or taxes or amount available for return on investment, relates to the Antioch Bridge. All of these figures relate to the Carquinez Bridge alone.

Furthermore, the rates fixed in the Decision are rates made specifically applicable to the Carquinez Bridge alone.

While the Decision states (page 4) that in fixing rates for traffic over the Carquinez Bridge, consideration would be given to the effect of such rates on the Company as a whole, this statement is obviously an inadvertence. The computations resulting in the rate and the rate fixed [fol. 66-7] relate exclusively to the Carquinez Bridge. The Decision says nothing about what the rate on the Antioch Bridge will be or of the effect of the reduced rates on the financial situation of the American Toll Bridge Company as a whole.

2. Inevitable Effect of Decision on Tolls of Carquinez Bridge, Antioch Bridge and Martinez-Benicia Ferry

The inevitable effect of the Decision, if it becomes effective, will be as follows:

- (1) The tolls charged for automobiles and passengers moving across the Carquinez Bridge will be the very minimum tolls which the Commission thought it could establish without being subject to the condemnation of the courts;
- (2) As the Antioch Bridge serves substantially the same territory and the same traffic as the Carquinez Bridge, the inevitable effect of the Decision, if it stands, would be to force the Company to reduce the Antioch Bridge tolls to the same level as the Carquinez Bridge tolls, and thus to still further weaken the financial condition of the Company.

Exhibit 1, introduced by the Commission's own witness Mr. Coleman, shows (page 23) that the Antioch Bridge operated in the red in the years 1926, 1927, 1928, 1933, 1934 1935 and 1937.

(3) As the Martinez-Benicia Ferry is competitive with the two toll bridges, it would be necessary for this sub [fol. 66-8] sidiary of the American Toll Bridge Company to reduce the ferry tolls to at least as low as those charged by the two toll bridges. Heretofore, the ferry tolls were 45¢ per automobile plus 10¢ per passenger, the automobile rate being 15¢ less than that of the toll bridges. Mr. Lester S. Ready testified that the inevitable effect of reducing the toll bridge rate to 50¢ per automobile with five passengers would be to force a reduction in the tolls of the ferry to such an extent that the ferry would not longer pay operating expenses. (Tr. 692-4; Exh. 128.)

Thus, by limiting its consideration to the only profitable one of these three transportation agencies and reducing rates to the farthest extent possible on that one agency considered alone, the inevitable effect of the Commission's decision would be to drive down the revenues and the net in come of American Toll Bridge Company to a point fabelow what any court would sustain. The property of American Toll Bridge Company would thus unquestionably be confiscated.

The fair and the lawful thing to have done would have been for the Commission to have considered the entire transportation properties of American Toll Bridge Company and to have established rates which would have yielded fair return on the entire property of the Company devotes to the service of transportation.

The Decision as rendered by the Commission, is unfair and unjust, is contrary to the Commission's own tradition [fol. 66-9] and policy and violates the rights of American Toll Bridge Company under Section 1 of Article XIV of the Amendments to the Constitution of the United State and Sections 13 and 14 of Article T of the Constitution of California.

3. The Decision is Contrary to the Commission's Own Traditions and Policy

Thus, in connection with electric rates, it has always been the Commission's policy to consider the rates of an entir

system, not merely considering the fat and leaving out the lean, but considering the two together. Hence, the electric rates for city areas have been fixed by the Commission somewhat higher than would have been the case if the city areas had been considered alone.

The same principle has been applied by the Commission in natural gas rate cases. Thus, in the famous Pacific Gas Natural Gas Case, decided by Commissioner Seavey on November 13, 1933 (39 C. R. C. 49), the Commission considered at some length the question whether it would continue its former policy of correlating the city with the urban territory, that is, the fat with the lcan. Commissioner Seavey thereupon said (page 55):

"It will be the endeavor to make all adjustments in the spread of rates that the record indicates are equitable, but no change in the general policy heretofore adopted will be recommended".

The same principle was applied in City of San Diego v. San Diego Consolidated Gas and Electric Company, 37 [fol. 66-10] C. R. C. 167, decided on February 15, 1932. In this decision, written by Commissioners Seavey and Carr, the Commission provided higher rates for the electric properties than would have been allowed if those properties had been considered alone. The Commission considered the entire business, including the less profitable natural gas business, and for that reason fixed somewhat higher rates for the electric properties than otherwise would have been the case, in order to carry the less profitable gas properties.

As far as telephone rates are concerned, this Commission has always provided somewhat higher rates for the more populous exchanges and for toll service than would have been the case had they been considered alone, the purpose being to help carry the lean exchanges in the less thickly populated territory.

In the case of the Carquinez and the Antioch Bridges, the situation comes clearly within the Commission's long-established rule.

The two bridges constitute one transportation system fendering a complementary and unified service in which the Carquinez Bridge serves primarily the more populous metropolitan area, while the Antioch Bridge serves primarily a neighboring less populous rural area.

They serve the same general territory, they are competitive with one another, they are owned and operated by the same company, were financed and constructed by the same [fol. 66-11] company with bond issues jointly covering both properties, and they are clearly parts of one and the same enterprise.

The Commission's Decision, in fixing rates for the Carquinez Bridge alone, violates the Commission's long-established policy, to the very substantial injury of American

Toll Bridge Company.

4. The Commission's Action Deprives American Toll
Bridge Company of Its Property Without Due Process
of Law in Violation of Guarantees of the Federal and
the State Constitutions

From the facts hereinbefore stated, it seems too clear for further discussion that the Commission's action in denying counsel's motion and in fixing rates for the Carquinez Bridge alone was unfair and arbitrary and deprived American Toll Bridge of its property without due process of law in violation of the Company's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

# III

Failure to Give Fair Return on Fair Value of Carquinez-Bridge

1. Calculations of Commission in Computing Its Rate

While the Commission did not, in its Decision, follow the usual course of setting forth clearly the computations leading to its conclusion, it is a fair inference from its [fol. 66-12] Decision that the steps leading to its conclusion were as follows (Decision, pp. 8-9):

In computing the rate base, the Commission took the figure of \$7,863,451, which represents a portion only of the book cost. From this figure, the Commission deducted \$375,000 for unnamed items, thus securing a rate base of

\$7,488,451.

The Commission then took Mr. Hunter's figure of \$551,-946 as the amount which would have been available for return on the rate base if the 50¢ toll charged by the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge had been effective on the Carquinez Bridge throughout the year 1937.

Dividing \$551,946 by \$7,488,451, the Commission then secured a return of 7.37%, which figure it rounded out to 7.5%.

The Commission then established the "slightly higher" rate of 45¢ per automobile plus 5¢ for each passenger on foot or in vehicles and ordered the Company to charge this rate, beginning March 1, 1938.

We shall now show that in making these computations the Commission made grave errors to the serious detriment of American Toll Bridge Company.

# . 2. Errors in Commission's Computations

# (1) Rate Base:

Said sum of \$7,863,451 is the lowest figure in the record relating to original or reproduction costs of the Carquinez [fol. 66-13] Bridge (disregarding the thoroughly discredited estimates of Mr. Mitchell). The figures are as follows:

Book cost (without including any land or furniture and fixtures or a proper allowance for interest during construction or any cost of developing the business) \$7,863,451 Corrected original cost (including a proper al-

lowance for interest during construction)—
Gerwick and Ready, Exh. 117, p. 27

8,332,622

Reasonable historical cost—Gerwick and Ready,

Exh. 117, p. 27

Reproduction cost new—Gerwick and Ready, Exh. 118, p. 25 8,743,231

None of the above figures include any allowance for the cost of developing the business, for which item, as we shall show later, a minimum amount of at least \$300,000 must be added.

Without waiving the right to urge that a higher rate base should be adopted and merely for the purpose of following through on the Commission's own figure of \$7,863,-

451, we shall now point out the items which were obviously erroneously omitted therefrom, as follows:

#### a. Land:

The Commission's said figure contains no allowance whatsoever for land. The amount of the omitted item is \$66;-834.62. (Ready, Tr. 620-1; Exh. 117, pp. 27-8.)

#### b. Furniture and fixtures:

The Commission omitted these items. They amount to \$19,668.23 for the Carquinez Bridge. (Ready, Tr. 621, Exh. 117, p. 27.)

# [fol. 66-14] c. Interest during construction:

The Commission's said figure allows only \$688,092.56 for interest during construction. The amount is grossly understated. Mr. Mitchell, one of the Commission's own witnesses, admitted that this amount is too low by \$415. 541.44 and that the correct amount should be \$1,103,634. (Mitchell, Tr. 241-2; Exh. 16, pp. 15, 19.)

Mr. Ready reported the somewhat lower figure of \$1,-070,761 (Ready, Tr. 634-42; Exh. 117, p. 27; Exh. 119)

which we shall use herein.

d. Cost of developing the business: going concern value:

The Commission allowed nothing whatever for the cost of developing the business, sometimes called going concerr value.

Up to the time of this Decision, it had always been the Commission's policy, in dealing with a new public utility, to make a reasonable allowance over a reasonable period of time, for the cost of developing the business of such new public utility. This is to permit the new enterprise to develop sufficiently to pay the costs of running the business.

Thus, in Monahan v. San Jose Water Company, 4 C. R. C. 1101, President Eshleman said (p. 1115):

"I am firmly of the opinion that necessary development cost, which is interest on the idle money in a plant during [fol. 66-15] a reasonable time in which it may reasonably

be expected not to be fully productive, is as much a part of the cost of the plant as an expenditure for pipe or right of way. What I mean definitely is this: There is presented a field for the operation of a public utility. It is known that this utility after it is constructed and ready to begin operation can not from the beginning earn a reasonable amount on the investment. A fair degree of wise foresight prepares the business man for these losses in the early days of his business, and if such losses are not to be recouped from earnings after the plant has reached maturity, then the investor can not be expected to make such investments. But this principle does not justify the investment of money in an enterprise that does not give promise of reaching a paying basis within a reasonable time. If the business is well conceived, where will be a uniform approach from the very beginning of the operation of the completed enterprise to a fully paying basis. During the development period, therefore, there will be yearly a decreasing amount of the capital investment which is not returning a reasonable amount, and the interest upon this decreasing amount of idle capital is a part of the cost of the property which, must be foreseen and prepared for by the investor and must be allowed by the rate-fixing body."

In Town of Antioch v. Pacific Gas and Electric Company, 5 C. R. C. 19, the Commission, after quoting from City of [fol. 66-16] Palo Alto v. Palo Alto Gas Company, 2 C. R. C. 300, 310 and from the Monahan Case, supra, continued (p. 37):

"In City of Milwaukee vs. Milwaukee Electric Railway and Light Company (Vol. 10, Wisconsin Railroad Commission Reports, p. 1), one of the most recent and extensive of the decisions of the Railroad Commission of Wisconsin, the Commission, at page 122, says:

"'It is conceded that in addition to the value of the tangible property some allowance is properly made for the cost of building up the business, or the losses sustained before the property has been placed upon a paying basis. Previous decisions of this commission have recognized the necessity of compensating for such early losses and the existence of a going concern value is recognized by both parties to the complaint in the present case. (Citing cases).'

"In People vs. Willcox, 141 N. Y. S. 677, Mr. Justice Milier defines 'going value' as follows:

"'I define "going value" for the purposes as involved in this case to be equal to the deficiency of net earnings below a fair return on actual investment due solely to time and expenditures reasonably necessary and proper to the development of business and property to its present stage; and not comprised in the valuation of the physical property. 6 "Going value" is to be appraised by showing the actual experience of a company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up a business, all expendi-[fol. 66-17] tures not reflected by the resent condition of physical property, the extent to which tad management or other causes prevent or deplete earnings, and any other facts bearing on the question, keeping a mind that the ultimate fact to be determined is not the amount of expenditures, but the deficiency in a fair return to investors due to the causes under consideration.'

"It will be noted that in each of the foregoing quotations the basis used is that of actual expenditures, thus following the investment theory. If the reproduction value theory is followed, experts at times estimate the expenditures which would probably be made before the hypothetical or comparative plan to which they refer should have been placed upon an earning basis identical with the existing property. These estimates are largely guestwork and are most unreliable, and will be given very little weight by this Commission, particularly if evidence of the actual facts can be secured. The best evidence of what should be allowed for developing the business is the money which has actually been expended for that purpose."

To the same effect, see also

City of Pale Alto v. Pale Alto Gas Company, 2 C. R. C. 300 (Commissioner Thelen);

Application of Southern Sierras Power Company and Holton Power Company, 18 C. R. C. 81c, 837 (Commissioner Brundige);

[fcl. 66-18] Rates of Pacific Gas and Electric Company for natural gas, 39 C. R. C. 49, 65 (Commissioner Seavey).

There are many decisions of the Supreme Court of the United States and of the lower Federal courts to the same

A number of the leading decisions are cited in McCardle v. Indianapolis Water Co., 272 U. S. 400, in which case the rt said (p. 414):

"The decisions of this court declare: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus adranced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.' Des Moines Gas Co. v. Des Moines. 238 U. S. 153, 165: Denver v. Denver Union Water Co., 246 U. S. 178, 191, 192. And see National Waterworks Co. v. Kansas City, 62 Fed. 853, 865; Omaha v. Omaha Water, Co., 218 U. S. 180, 202, 203, and cases cited."

The point is too clear to justify the citation of further

authority.

On the subject of the amount to be added for this item. each case is, of course, governed by its own facts. However, an allowance of at least 10% of the cost of reproducing [fol. 66-19] new the physical properties is quite customary, perticularly in the more recent decisions.

In the present case, we have a remarkably complete record of all receipts and all disbursements in connection with the operations of both the Carquinez Bridge and the An' tioch Bridge and the Company as a whole, from the very first day of the operation of the respective bridges through the year 1937. (Ready, Exh. 132, Tables No. 4, 5, 6; see also. although in lesser detail. Exh. 1-Coleman, and Exh. 19 -Hunter.)

If the very low figure of the deficiency of the income of the Carquinez Bridge below the 9% cost of money, with interest, is taken for the first five years of operation, the result is the sum of approximately \$300,000. This sum is less than 5% of the cost of reproducing new the physical property. (Exh. 118, p. 25) and is most reasonable under any accepted standard.

The Commission's failure to make any allowance for this.

item constitutes clear error of law.

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With the above additions, the Commission's figure becomes—

Figure used by Commission	\$7,863,451
Land	66,835
Furniture and fixtures	
Interest during construction-amount added to	
correct error	382,668
Cost of developing business-minimum allow-	
ance	300,000
	• • • • • • • • • • • • • • • • • • • •

\$8,632,622

[fol. 66-20] On the assumption that we start with the Commission's own figure and make only the necessary additions for omitted items, we thus have a minimum rate base of \$8,632,622.

(2) Money available for return on Rate Base (under 50¢ toll):

In estimating the amount of money which would have been available for return on the rate base, if the 50¢ toll had been effective, the Commission (Decision, p. 8) referred to Exh. 23 (Hunter) and Exh. 134 (Ready).

Mr. Hunter's exhibit referred exclusively to the year 1937. The Commission, however, was fixing a rate for 1938. (Decision, pp. 8-9.) For reasons which we shall shortly state, Mr. Hunter's figures for 1937 should not be accepted for 1938.

Mr. Ready's exhibit reports not merely what would have been the effect of applying the 50¢ rate to the actual business of 1937 but also what would be the estimated result in 1938 and in each of the subsequent years to the end of the franchise in 1948.

Mr. Ready's testimony is the only evidence in the record as to the result of 1938 operations under an assumed 50c toll.

In referring to Mr. Ready's exhibit, the Commission (Decision, p. 8) states the same correctly down to and including the figure of \$629,799 for "net income before income taxes". (Exh. 134, p. 2, year 1938.) Then, however, the Commission either made a gross error in arithmetic or, without any warrant whatever, took the income tax figure

[fol. 66-21] of \$54,309 for 1939 and shifted it back to 1938 in lieu of Mr. Ready's figure of \$133,237.

Mr. Ready estimated the number of dollars which the Company would be required to pay for operating expenses and taxes of the Carquinez Bridge, year by year. His figure of \$133,237 to be paid in 1938 for the sum of federal income taxes and state franchise tax is correctly computed.

The amount of money reported by Mr. Ready is available on 1938 traffic on an assumed 50¢ toll, for return on a proper rate base, was \$496,562 and not \$575,000 as stated

by the Commission. (Decision, p. 8.)

The Commission's statement concerning Mr. Ready's figures is either a gross arithmetical error or an absolutely unwarranted attempt to show that the money which would be required to be paid out by the Company in 1938 would be almost \$80,000 less than would actually be the case.

At page 8 of the Decision, the Commission says:

"A reduction in rates will stimulate the traffic over the bridge, although the extent of course, cannot be estimated with exactitude."

We believe it proper to point out here that Mr. Hunter (for the Commission) and Mr. Ready (for the Company) agreed that under a 50¢ toll the stimulation would be 13½% and that the final figures of Mr. Hunter and Mr. Ready include and account for such stimulation, to its full extent. Under the record in this case, no further revenue can properly be added, by reason of stimulation of traffic, to the [fol. 66-22] figures already reported by the two engineers.

We now point out why Mr. Hunter's 1937 figures can not properly be used in computing 1938 revenues and ex-

penses:

#### a. Operating revenues:

In Exh. 23, Mr. Hunter reports an actual operating revenue of \$1,542,058 for 1937, assumes that under a 50c toll there would have been a reduction of \$385,183 in that revenue and hence advises that the operating revenue would have been the difference between these two figures, namely, \$1,156,875.

These figures can not be used in estimating 1938 revenues for the reason, among others, that the 1937 figures include revenue from 100,090 to 110,000 vehicles containing "curi-

osity travelers" who took the trip due to the opening of the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge in 1937. That traffic will not exist in 1938. (Ready, Tr. 717-18.)

# b. Operating and Maintenance Expense:

Mr. Hunter's 1937 figures naturally do not include any part of the expenditure of \$50,000 for additional riprap which must be placed in 1938 and 1939 to protect certain of the piers of the Carquinez Bridge. (Gerwick, Tr. 610-11.) Mr. Ready spread this expenditure over a period of five years, assigning \$10,000 to the maintenance expenses [fol. 66-23] of 1938. (Ready, Tr. 730; Exh. 132, Table 4.) This method of handling the matter is at least fair to the Commission.

# c. Amortization of Investment (Depreciation):

Mr. Hunter's figure of \$200,465 is too low by at least \$6,000 because he based it on the discredited Mitchell figure of investment.

#### d. Federal income tax:

Mr. Hunter's figure of \$98,810 for Federal income tax can not be used because it does not properly compute the Federal income taxes chargeable to the Carquinez Bridge. Mr. Ready's figure of \$108,511, is correctly calculated on the 1937 income. (Exh. 134, p. 2, year 1938.)

There are other items in Mr. Hunter's 1937 figures which can not be used in 1938 computations, but we believe it un-

necessary to pursue the subject further.

# 3. Return under Rate Fixed by Commission

We turn now to the question of the amount of money which would be available for return on a proper rate base, if the rate of 45¢ per automobile plus 5¢ per passenger were made effective throughout the year 1938.

The computation is simple. All that is required is to take Mr. Ready's Exh. 134, page 2, year 1938, and make the necessary changes in operating revenue (due to the application of the new tolls) and in gross revenue tax, [fol. 66-24] which is 2% of the operating revenue.

In computing the new operating revenue, a slight reduction must be made from the 13½% assumed stimulation of

traffic, due to the fact that the new rate is "slight, higher" than the 50¢ rate on which Mr. Hunter and Mr. Ready based their calculations. We shall assume a 10% stimulation of traffic under the new rate, if it were made effective.

The effect of the Commission's rate, as applied to the

assumed 1938 traffic, would then be as follows:

Operating Revenues:

# Carquinez Bridge

1938

						b 1		
Tolls				 	\$1,135,277		. 0,	
Rents	and	miscella	aneous	 	8,243	\$1,	143	,520

nents and imsechaneous.	0,240	\$1,140,020
Direct Operating Expense:		
Operation and maintenance Gross revenue tax (2%)	146,700 22,706	
Total General expenses	169,406 63,852	
Total direct and general expenses	233,258	
Amortization of investment	206,727	
Total expenses plus amortization	439,985	
Net income before income taxes	703,535	
Income taxes:		
Federal income tax State franchise tax	108,511 24,726	
Total income taxes	133.237	

State	franchise tax 24,	(26)
	Total income taxes 133,5	
Total	expense	573,222
1	Net income available for re-	

turn on rate base

\$570,298

[fol. 66-25] The record shows that the actual cost of money to American Toll Bridge Company was slightly in excess of 9%.

On said rate base of \$8,632,622 a net income of \$570,298 would yield a return of only 6.60%.

Even if we deduct from said sum of \$8,632,622 the sum of \$375,000 appearing on page 8 of the Commission's Decision and representing unnamed items, the rate base would become \$8,257,622, on which amount a net income of \$570,298 would yield a return of only 6.9%.

4. In View of the Cost of Money to American Toll Bridge Company, a Return of Only 66% or 6.9% on the Fair Value of the Carquinez Bridge Would be Confiscatory

The record shows that the construction of the Carquinez Bridge was a hazardous enterprise. There were grave doubts as to whether the bridge could be constructed at all. The Carquinez Bridge was the pioneer among the toll bridges across San Francisco Bay.

There were further grave doubts as to whether the bridge, if completed, would attract sufficient patronage to justify its construction from a financial point of view. The population in the Sep Francisco Bay territory was not as yet "bridge-minded" (to borrow a phrase from Dean Derleth, the chief engineer on this great project).

These hazards, physical and financial, naturally found reflection in the matters of whether the funds necessary for the construction could be secured at all and, if so, what

[fol. 66-26] the cost of the money would be.

Mr. Coleman, financial expert for the Commission, testified that if the discount and expense in connection with the issue of its bonds by American Toll Bridge Company be amortized on the straight line basis, the cost of the Company's bond money was 9.71%. (Exh. 1, p. 17.)

If said discount and expense were amortized on the six per cent sinking fund basis and the capital stock which it was necessary to issue to the investment houses which underwrote the bonds be disregarded, the average cost of the bond money would be reduced to approximately 8.6% (Exh. 1, p. 17). However, Mr. Coleman further testified that the underwriters would not take the bonds unless this particular stock was issued to them and that it seemed to be necessary to issue the stock as part of the sale of the bonds (Coleman, Tr. 295). Under the circumstances, it would seem clear that the value of this stock at that time must be included in the cost of the bond money.

Mr. Ready reported that the cost of bond money to American Toll Bridge Company bearing in mind both the interest charges and the amortization of bond discount and expense, was as follows:

On straight line amortization On sinking fund amortization 9.71%
9.07%

[fol. 66-27] • The Decision herein states (p. 9) that "when tested upon the bases usually followed by the Commission" a return of 7.5% upon a proper rate base would be proper in this case.

This statement is directly contrary to our understanding of the policy which the Commission has, throughout the years, followed in the matter of the rate of return.

We understand that it has been the uniform policy of the Commission to allow a rate of return somewhat in excess of the cost of money utilized by the utility in the construction of its enterprise.

Mr. Hunter, the Commission's own witness, so testified. At page 331 of the transcript of the testimony, appear the following questions and answers:

"Q. (by Mr. Thelen): As a matter of fact, isn't it the policy of the Commission to ascertain the cost of money and then to allow something in excess of that? Hasn't that been the policy throughout all the years?

"A. '(by Mr. Hunter): I rather think so.

"Q. Then in this case, Mr. Hunter, don't you think when it comes to the fixing of the actual rate, that it would be proper for the Commission to ascertain the cost of money and then make some additional allowance over that?"

"A. Well, I should say the Commission should follow its precedent as much as it can if they have a case that is any-

where comparable."

The published volumes of the Commission's Opinions and Orders contain literally hundreds of decisions which [fol. 66-28] bear out the truth of Mr. Hunter's testimony and of our position on this subject.

Mr. Ready, who was for a number of years the Commission's chief engineer, and who is thoroughly familiar with

the Commission's practice and policies, submitted Exh. 129, on the subject of the relationship between the cost of money and the rate of return found to be reasonable by the Commission. In this exhibit, Mr. Ready gives reference to a large number of decisions of the Commission in rate cases. He shows, in each instance, the cost of money to the utility and the rate of return found by the Commission to be reasonable as to that utility.

Referring to the largest and most substantial public utilities in the state, Mr. Ready found that the rate of return found by the Commission to be reasonable as to them has averaged 1.15 times the cost of their money. (Ready, Mr. 695-7044 Exh. 129.)

In the case of a hazardous and pioneer enterprise such as American Toll Bridge Company; the ratio should, of course, be somewhat greater. However, taking said ratio of 1.15 and applying it to the cost of money to American Toll Bridge Company, Mr. Ready reported that a fair rate of return would be as follows:

Money cost based on non-inclusion of bonus stock—1.15x8,48%

Money cost based on inclusion of bonus stock—
1.15x9.07%

Rate of Return
9.75%

[fol. 66-29]" He then concluded that a 10% return would be a reasonable rate of return for American Toll Bridge Company on the moneys invested by the stockholders and bondholders. (Ready, Tr. 704; Exh. 129, p. 5.)

Even bearing in mind that the properties of American Toll Bridge Company are being amortized on a 5% sinking fund basis, under which the moneys in the depreciation reserve are increasing, from year to year, a fair rate of return for the year 1938 was nevertheless reported by Mr. Ready to be somewhat in excess of 9%, which figure would also be the average fair rate of return throughout the life of the franchise. (Ready, Tr. 705-6.)

In the light of these facts and this testimony, no argument is required to show that a return of only 6.6% or even 6.9% on the fair value of the property of the Carquinez Bridge would be confiscatory.

5. Summary as to Fair Return, Carquinez Bridge

The situation as to fair return as to the Carquinez Bridge may be succinctly summarized as follows:

- (1) While the Decision says that the tolls therein established will yield a return "slightly higher" than 7.5% on a proper rate base for the Carquinez Bridge, it is obvious, when correction is made for numerous errors and omissions, that the return would not be in excess of 6.6% or, at the most, 6.9%.
- (2) It has been the Commission's policy throughout the [fol. 66-30] years to allow a return somewhat in excess of the cost of money to the utility. On the average, the return has been 1.15 times the cost of money for well established utilities. However, in the present case, in dealing with a hazardous utility, the Commission is not merely denying anything above the cost of money, on its own figures, but is cutting deep below the cost of money.
- (3) The Decision clearly confiscates the property of American Toll Bridge Company in the Carquinez, Bridge and violates the Company's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States and under Sections 13 and 14 of Article I of the Constitution of California.

#### LY

Failure to Give Fair Return on Fair Value of Carquinez and Antioch Bridges

As we have hereinbefore pointed out, any reduction in the tolls charged for transportation on the Carquinez Bridge must necessarily be followed by a similar reduction in the tolls of the Antioch Bridge.

Furthermore, if the tolls fixed by the Commission become effective as to the Carquinez Bridge, the Martinez-Benicia Ferry will no longer be able to make even operating expens-s. (Ready, Tr. 692-4.)

[fol. 66-31] In this connection, the following news item appearing in the San Francisco Examiner of February 11, 1938, is significant:

#### \* "Carquinez Bridge Rate Cut Protest

Reduction by the Railroad Commission of the Carquinez Bridge fares from 60 cents per car and 10 cents per passenger to 45 cents and 5 cents vesterday brought a protest from the Antioch Chamber of Commerce.

The protest was based on the fact that the higher rate

is still in effect on the Antioch Bridge.

At Martinez, the Chamber of Commerce began steps to bring about a reduction in ferry tolls, which are 5 cents higher per passenger."

The above results, as far as the Antioch Bridge and the Martinez-Benicia Ferry are concerned, will follow just as definitely and inevitably as though the Commission had frankly included these additional transportation agencies in its investigation and had made its order directly applicable to them.

In what we are about to say, we shall confine ourselves to the business and property of American Toll Bridge Company in so far as the same relate to the Carquinez Bridge and the Antioch Bridge.

#### 1. Rate Base

The reasonable historical cost of the Antioch Bridge is

\$1,597,789.00 (Gerwick and Ready, Exh. 120, p. 4).

If the same method of determining the cost of developing the business is used as to the Antioch Bridge as we herein-[fol. 66-32] before used with reference to the Carquinez Bridge (income below a 9% cost of money, 1926 to 1929, incl.), the minimum amount to be added for this item is found to be \$550,000.90.

On the basis hereinbefore used for determining minimum rate base for the Carquinez Bridge, a minimum rate base

for both bridges together would be as follows:

Antioch Bridge—reasonable historical cost
Antioch Bridge—cost of developing the business

\$8,632,622
1,597,789
550,000

# Rate base for both bridges

\$10,780,411

# 2. Return under Rate Fixed by Commission

The amount of money which would be available in 1938 for return on a fair rate base, in the event that the rate fixed by the Commission should become effective as to both the Carquinez and the Antioch Bridges, can be readily ascertained by recourse to Mr. Ready's Exh. 134.

It will merely be necessary to turn to page 4 of that

exhibit, relating to American Toll Bridge Company's operation of both toll bridges, year 1938, and make the necessary changes in operating revenue (due to the application of the 45¢ plus 5¢ proposed tolls) and in the item of gross revenue tax.

[fol. 66-33] Here, also, we shall assume a 10% stimulation in the business of both bridges, combined, resulting from the assumed effectiveness of the new tolls prescribed by the Commission.

The effect of the new tolls, applied to both bridges, on

1938 traffic, would be as follows:

Operating Revenue:

Tolls

# Carquinez and Antioch Bridges

\$1,241,976

22,375

114,548

\$1,250,339

Rents and miscellaneous	8,363
Direct Operating Expenses:	*
Operation and maintenance Gross revenue tax (2%)	189,885° 24,839
Total General Expenses	214,724 69,860
Total direct and general expenses Amortization of investment	284,584 244,887
Total expenses plus amortization	529,471
Net income before income taxes	720,868
Income taxes:	
Federal income tax •	92,173

Net income available for return on rate base

Total income taxes

Total expense

State franchise tax

606,320

644:019

On said rate base of \$10,780,411 for the combined Carquinez and Antioch Bridge properties, a net income of \$606,320 would yield a return of only 5.6%.

[fol. 66-34] If we again deduct from the Carquinez Bridge rate base the sum of \$375,000, merely to follow the Commission in its calculations, the above combined rate base would become \$10,405,411, on which amount a net income of \$606,320 would yield a return of only 5.8%.

3. Effect of Commission's Decision Would be to Confiscate.
Property of American Toll Bridge Company in Both
Carquinez and Antioch Bridges

Bearing in mind the cost of money to American Toll Bridge Company and the fact that the effect of making the Commission's Decision applicable to both bridges would be a combined return in 1938 more than 2% below the bare cost of money, without any additional allowance whatever, we believe that it would be an unjustifiable expenditure of time and effort to pursue this point further.

Beyond any possibility of a doubt, the application of the Commission's tolls would confiscate the transportation system of American Toll Bridge Company, consisting of the Carquinez and the Antioch Bridges, and would violate the Company's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States and under Sections 13 and 14 of Article I of the Constitution of California.

[fol. 66-35]

Under Commission's Tolls American Toll Bridge Company Would be Unable to Meet its Requirements to its Bondholders and Stockholders

The Carquinez and Antioch Bridges of American Toll Bridge Company are "wasting assets". At the expiration of the franchises in 1948, the bridges will become the properties of the Counties of Contra Costa and Solano without the payment of any compensation to American Toll Bridge Company.

Unless American Toll Bridge Company has by that time fulfilled its obligations to its bondholders and its stock-

holders, it will never be able to do so.

In obvious recognition of a duty to see to it that the Company's tolls are not cut so drastically as to make the Com-

pany impotent to fulfill said obligations, the Commission, through Mr. Coleman, introduced Exh. 22 entitled "Estimated Cash Requirements." The purpose of this exhibit was to show that the Company could suffer a substantial reduction in its revenues and still be able to pay principal and interest on its bonds and an 8% dividend on its stock and retire its stock at par.

The exhibit ignored the fact that up to December 31, 1935 no dividends had ever been received by the stockholders and that the principal amount of these unpaid dividends at 8% amounts to \$2,404,600,00.

The exhibit set forth merely an "average year", without reference to the actual cash requirements of any particular [fol. 66-36] year. It assumed that stock could be retired from property which was not cash and as to which serious doubts exist as to when it could be converted into cash and how much cash could be realized therefrom.

Provision was made for the amortization of the bonds over a period of 10 years, whereas it is necessary, under the bond mortgage, to pay the same off completely within approximately 8½ years.

The exhibit spoke as of October 31, 1937. By December 31, 1937, the situation had already substantially changed, so that the computations of the exhibit could no longer be relied upon.

All of these matters and others were developed in cross-examination of Mr. Coleman (Tr. 303-318) and in direct examination of Mr. J. W. Haines, a partner in the firm of Haskins & Sells, who appeared as a witness for American Toll Bridge Company. (Tr. 666-685; 779-89.)

However, the presentation of the exhibit may be assumed to evidence a realization by the Commission of a responsibility in the case of a "wasting asset" different from and perhaps beyond that which exists in the usual case of a public utility whose franchises either extend over long periods or are without limit as to time.

After Exh. 22 had been presented, American Toll Bridge Company submitted, through Mr. Haines, Exh. 126, which is a statement, prepared with meticulous care and accuracy, showing the actual cash requirements, in each year from 1938 to June 30, 1948 in the event that American Toll Bridge [fol. 66-37] Company should undertake to meet its obliga-

tions on principal and interest of its bonds, pay 8% dividends on its capital stock and retire the stock at par by the

time the Company's franchises will have expired.

In a subsequent supplemental exhibit (No. 136), Mr. Haines showed in great detail how all the computations in Exh. 126 on the important subject of the various classes of Federal taxes—capital stock, excess profits, normal income and undistributed profits—were made.

A comparison of the cash required, year by year, with Mr. Ready's estimates of the cash which would be available under the assumed 50¢ rate (Exh. 134, Table 4) shows that the 50¢ toll would have failed, by a wide margin, to enable the Company to meet its obligations to its bondholders and its stockholders, even if the failure to pay any dividends whatever to its stockholders during the period from June 1, 1927 to December 31, 1935 be entirely disregarded.

In the Decision herein, the Commission disposes of the

matter with this single sentence (p. 9):

"Such a rate (i. e., the 45¢ plus 5¢ rate) should enable the company to meet its requirements under its trust indenture and amortization and dividend requirements."

The Decision refers to no evidence whatever in support of this general conclusion.

Attached to this Petition as Exhibit A, the Commission [fol. 66-38] will find a statement entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948—Under Rates ps per C. R. C. Decision." We have prepared 'his exhibit for the purpose of ascertaining whether or not the 45¢ and 5¢ rate will really enable the Company to meet its obligations to its bondholders and its stockholders.

The exhibit and the sources of its figures are readily understood. The operating revenue figures are secured by applying to the traffic shown in Exh. 134, Table 4, the new rate fixed by the Commission, assuming a 10% stimulation in auto traffic. The items of "total direct and general expenses" and "state franchise and federal income tax" are readily ascertainable from said Table 4 in Mr. Ready's Exh. 134 by adjustment for increased county, state and Federal taxes resulting from increased operating revenue.

The items for "bond interest and retirement" are the actual requirements under the Company's bond mortgage and are shown in Exh. 126 (Mr. Haines). The total num-



ber of shares of stock outstanding at the beginning of 1938

likewise appears in Mr. Haines' exhibit.

The remaining figures are easily understood. The money remaining at the end of each year, after the other obligations to bondholders and stockholders have been met, is simply used to retire capital stock at \$1.00 per share.

The exhibit shows that at the end of the franchise period [fol. 66-39] in 1948 the revenues from the rates now fixed by the Commission will have failed to retire 437,167 shares of

stock of the par value of \$1.00 per share.

The exhibit further shows that said revenues will have failed to apply as much as a single dollar on the \$2,404,600 of dividends at 8% which the Company failed to earn and declare during the period from June 1, 1927 to December 31, 1935. Said figure of \$2,404,600 includes nothing whatever for interest.

Finally, the exhibit shows unretired capital stock at \$1.00 as per share plus unpaid dividends, at the end of the franchise

period, totaling \$2,841,767.

It thus appears that under the tolls now fixed by the Commission, the Company will fail by a very large sum to earn sufficient revenue to enable it to meet its obligations to its bondholders and stockholders.

#### VI

# Impairment of Contract Obligations

The franchises for the construction of the Carquinez and Antioch Bridges were granted by the County of Contra Costa in the early part of 1923. The Carquinez Bridge franchise was granted by Ordinance No. 171, adopted on February 5, 1923, and the Antioch Bridge franchise was granted by Ordinance No. 175, adopted on June 4, 1923. Copy of the Carquinez Bridge franchise is part of the record in this case. It is attached as an exhibit to Exhibit 19.

[fol. 66-40] Each of these ordinances was adopted pursuant to authority vested by the Legislature in the County of Contra Costa under the Act of March 14, 1881 (St. 1881, ch. 68, p. 76). This Act, in granting to boards of supervisors the right to grant franchises for the erection of bridges on public highways across navigable streams, provided in Section 2 as follows:

"Sec. 2. The power to grant franchises to individuals, or corporations, to construct bridges, and the regulation of

tolls thereon, shall be exercised by the county on the left bank of all streams."

In 1923, subsequent to the time when said ordinances were adopted, the Legislature amended Sec. 2872 of the Political Code, expressly ratifying all franchises granted subsequent to March 14, 1881, for the construction of all bridges across straits, streams or creeks within the territory in which the Carquinez and Antioch Bridges are located.

It is, of course, well settled that a franchise creates a vested right by contract which cannot be impaired by subse-

· quent legislation.

United States Constitution, Article I, Sec. 10:

. 'Russell v. Sebastian, 233 U. S. 195:

Oro Electric Corporation v. Railroad Commission of California, 169 Cal. 466;

Postal, Telegraph-Cable Company v. Railroad Commission of California, 200 Cal. 463.

The State may delegate to a subordinate political subdivision, such as a city or county, the right not merely to [fol. 66-41] regulate the rates of a public utility, but also the right to enter into a contract with such utility on the subject of rates. Such contract, when entered into, is binding on such political subdivision and on the State, as well as the public utility, and prevents the State and its political subdivisions from altering the terms of such contract. Such alteration is expressly forbidden by Section 10 of Article I of the Constitution of the United States, providing in part, that no State shall pass any law impairing the obligation of contracts. Section 16 of Article I of the Constitution of California contains a similar inhibition.

> Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 382:

> Vicksburg v. Vicksburg Waterworks Company, 206 U. S. 496, 508;

> Railroad Commission of California v. Los Angeles Railway Corporation, 280 U. S. 145, 151-2.

It is a question, in each case, of whether or not the State has, in fact, delegated to the subordinate political subdivision the authority to enter into such contract and of whether or not the political subdivision has, in fact, acted under that authority.

In the present case, the franchises for the construction of the Carquinez and the Antioch Bridges were subject to the provisions of certain sections of the Political Code, which are to be read into the contract between the State of California, acting through the board of supervisors of the [fol. 66-42] County of Contra Costa, and the grantees of said franchises. These provisions of the Political Code form part of the contracts? We refer particularly to Sections 2845 and 2846 of the Political Code.

Section 2845 reads, in part, as follows:

"The board of Supervisors granting authority to construct a toll-bridge or to keep a public ferry, must at the same time:

"3. Fix the rate of tolls which may be collected for crossing the bridge or ferry which may raise annually an income not exceeding fifteen per cent on the actual cost of the construction or erection of the bridge or ferry, and such additional income as will provide for the annual cost of operation, maintenance, amortization and taxes of the bridge or ferry."

Section 2846 reads as follows: .

"License tax and rate of toils, how fixed.—The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

Acting under the mandate of said Section 2845, the board [fol. 66-43] of supervisors of Contra Costa County, at the time when they granted the franchises for both bridges, fixed the rates of tolls which the grantees might collect and inserted the same in the ordinances granting the franchises.

Thereupon, under the specific provisions of Section 2846, the grantees of said franchises had vested contract rights not to have said tolls diminished during the term of 20 years, at any time.

"unless it is shown to the satisfaction of the board of supervisors that the receipts from tells in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

The right to have the tolls inserted in the ordinance not diminished during the term of 20 years, except in the one situation specified in Section 2846, is a vested contract right of great value to the grantees of the franchises. Without such vested contract right, the Carquinez Bridge would probably never have been constructed.

In Section 2845, the regislature itself has declared what it meant by the word "disproportionate" as used in the next

section.

Construing Sections 2845 and 2846 together, it is clear that what the Legislature had in mind was that tolls which yield up to 15% on the cost of construction or erection, or the fair cash value thereof, together with the necessary repairs and maintenance, are not to be regarded as "disproportionate" [fol. 66-44] but that if and when the yield becomes more than 15% it will be deemed to be "disproportionate". In the latter event, even though this situation should develop within less than 20 years after the effective date of the franchise, the board of supervisors would have the right, under the contract, to reduce the tolls in the manner specified in the appropriate sections of the Political Code.

These contract provisions do not mean that American Toll Bridge Company is at this time necessarily entitled to a 15% return. They do mean, however, that the Company has a contract right to have the tolls specified by the board of supervisors of Contra Costa County in the ordinances granting the franchises not diminished by any public authority unless it should appear that the yield from such tolls has become in excess of 15%. In the present case, the record shows clearly that such yield has never approached as much as 15% and that at the present time it is very con-

siderably below 15%.

The contract right thus conferred is one of transcendent importance to investors in the securities of toll bridge companies. If said Sections 2845 and 2846 are to be so construed so that a board of supervisors can at any time reduce tolls when the yield is such as, according to the passing whim or fancy of the board, is "disproportionate", then it

could not be expected that any sane investors would put their money into the stock or bonds of such concerns. The Legislature took care of this situation by itself setting the standard of what it meant by the word "disproportionate" so as to prevent public authorities from following their own [fol. 66-45] passing whim or fancy as to what they could do.

The facts of this case give pointed significance to the wisdom of the Legislature in itself definitely setting the stand-

ard to be followed by the public authorities.

Here we have a case in which several thousand Californians purchased stock of American Toll Bridge Company at \$2.00 per share in cash. Up to December 31, 1935, the stockholders received no dividend whatever on their stock. Approximately one-half the life of the franchises expired before the first dividend was declared. Now, when the time has come when the stockholders might reasonably expect some return to compensate them in part for their sacrifices in the past, the Railroad Commission comes along, closes its eyes to the past, and with a shrug of the shoulder says, in effect:

We are not interested in the past. Our jurisdiction has only recently adhered. We shall look only to the earnings of 1937 and 1938, and shall cut as deeply as we can without any regard to the deficiencies of the past and the contract relations between the board of supervisors and the Toll Bridge Company.

Thus, Mr. Coleman, financial expert of the Commission, in justifying his failure to give consideration to the sacrifices which the stockholders made in the past testified as follows (Tr. 305):

"Of course, in this particular one, we had no voice in the matter until now, and that was the reason we were considering it from now on."

[fol. 66-46] And the presiding Commissioner indicated very clearly that he was not interested in whether or not the investor "had his reasonable dividends from the beginning until now!". (Commissioner Riley, Tr. 304.)

The presiding Commissioner even asked for authorities on the fundamental proposition, heretofore always recognized by the Commission, that in fixing rates for a new public utility the Commission will take into consideration the cost of developing the business during a reasonable period of time. (Tr. 309-10.) There authorities were supplied to the Commission.

The difficulty with the point of view expressed by the presiding Commissioner and Mr. Coleman is that they have entirely overlooked the fact that the Commission, in stepping into the shoes of the board of supervisors of Contra Costa County in the matter of the tolls charged by both the Carquinez and the Antioch Bridges, took over the duty of regulation subject to the existing contract rights between the State of California and the Toll Bridge Company.

The representatives of the Commission have entirely overlooked the fact that one of those contract rights is that during the term of 20 years subsequent to the effective date of the franchise, the tolls set forth in the ordinance cannot be diminished by the public authorities unless they shall first have found that the return yielded by those tolls has become more than 15% of the values specified in Sections 2845 and 2846 of the Political Code.

Bearing in mind the existing contract rights of the Toll Bridge Company, the only way in which the existing tolls [fol. 66-47] could be reduced at this time would be by mutual consent.

Hence, we urge that further point that the Commission's Decision and Order herein impair the obligation of Petitioner's contract with the State of California and violate Petitioner's rights under Paragraph 1 of Section 10 of Article I of the Constitution of the United States and Section 16 of Article I of the Constitution of the State of California.

#### VII

False Analogy with Publicly Owned and Operated San Francisco Bay Bridges

From the start to the finish, this case was an effort to reduce the tolls charged for automobiles and passengers over the Carquinez Bridge down to the tolls charged by the two publicly owned and operated bridges across San Francisco Bay.

On the basis of an analogy which was and is patently false and misleading, the effort was made to reduce the tolls

from 60¢ per automobile plus 10¢ per passenger to the tolls effective on the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge, namely, 50¢ per automobile and passengers, up to and including 5 passengers.

The plan was revealed in the very first sentence of the testimony of Mr. J. G. Hunter, the Commission's principal witness. Before American Toll Bridge Company had been [fol. 66-48] permitted to introduce a single word of testimony, Mr. Hunter, at the very outset of his testimony, revealed the purpose to cut the Carquinez Bridge toll down to the toll which was being charged by the San Francisco-Poakland Bay Bridge and the Golden Gate Bridge. (Tr. 85.)

In Exhibit 19, submitted by Mr. Hunter, he again compared the tolls charged by the Carquinez Bridge with those charged by the two publicly owned and operated San Francisco Bay Bridges and then presented tabulations in which he applied the tolls of the two San Francisco Bay Bridges to the Carquinez Bridge. (Exh. 19, pp. 10-13.)

Continuing, Mr. Hunter's exhibit says (p. 14):

"The matter of a revised rate structure has been given consideration and a preliminary study indicated that it appeared possible to adopt, for the Carquinez Bridge traffic, the same rate structure, with respect to automobile and passenger fares, as that now in effect on the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge, viz.:

50 cents for an automobile and passengers, up to and including five, with a rate of 5 cents for all other passengers, such rate structure to supersede the existing one of 60 cents per automobile plus 10 cents for each passenger."

The key figure of Mr. Hunter's said tabulations was a rate base of \$6,880,000.00 which figure he took from an exhibit prepared by an engineer loaned to the Railroad Commission for this purpose by the Department of Public Works. [401.66-49] \$6,880,000,00 was the figure on which Mr. Hunter computed his allowance for depreciation and also his rate of return. It was the key figure in his exhibit.

However, this figure and the exhibit in which it appears were thoroughly discredited on cross-examination of the witness, Mitchell. Without mentioning a host of other errors and omissions, it developed that Mr. Mitchell had made a mistake against American Toll Bridge Company in the single item of "interest during construction" in the sum of \$415,542.00. (Tr. 241-2; Exh. 16, pp. 15, 19.)

Nevertheless, Mr. Hunter clung to his predetermined tolls. Finally, in its Decision, when the Commission comes to the determination of the rates, it still has its eyes riveted on the tolls charged by the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge. Its computations are based entirely on those tolls (Decision, p. 8) and the rate finally fixed is stated by the Commission to be only "slightly higher than that proposed" (i.e., Mr. Hunter's proposal of the San Francisco Bay Bridge tolls).

The testimony in this case shows that this analogy on which the Commission's Decision is based, is entirely false and misleading.

On cross-examination, Mr. Hunter's analogy was badly shaken.

He conceded that he had taken the assumed investment figure of \$6,880,000.00 from Mr. Mitchell's report and had [fol. 66-50] made no independent investigation, into the matter. (Tr. 329.)

He conceded that from the point of view of proper tolls there are important differences between the Carquinez Bridge, on the one hand, and the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge, on the other hand. (Tr. 337.)

Thus, one very important difference arises from the fact that in the case of the Carquinez Bridge the investment must be amortized during the very short remaining life of the franchise, which now has only slightly more than 10 years to run, whereas no such situation exists as to the other two bridges. That means much more money required in the case of the Carquinez Bridge, for depreciation or amortization of the investment. (Tr. 337.)

Again, the cost of the money required for the construction of the Carquinez Bridge was much higher than that secured for the construction of the two publicly owned bridges. (Tr. 338.) Mr. Coleman, the Commission's own financial expert, reported that the cost of bond money for the Carquinez Bridge was 9.71% on the straight line basis and 8.60% on the sinking fund basis if capital stock necessarily issued to the financial hou es which sold the bonds be disregarded.

(Exh. 1, p. 17.) On the other hand, the bond money used in the construction of the San Francisco-Oakland Bay

Bridge, cost only about 4.5%. (Ready, Tr. 840.)

Mr. Hunter, accordingly, conceded that the funds secured from the Reconstruction Finance Corporation for the con[fol. 66-51] struction of the San Francisco-Oakland Bay Bridge were secured at very much lower rates of interest than the cost of money to American Toll Bridge Company. The same thing is true as to the bonds sold for the construction of the Golden Gate Bridge. The cost of money, accordingly, puts the Carquinez Bridge at a substantial disadvantage in comparison with the other two bridges. (Tr. 338.)

Furthermore, the San Francisco-Oal and Bay Bridge has the great advantage of a dense population immediately at either end of the bridge and of a great volume of traffic. Only 13 months and 2 days after the bridge was opened to traffic, the ten millionth automobile crossed the bridge. No such favorable conditions exist as to the Carquinez Bridge.

(Tr. 338-9.)

On the very important item of taxes, none of which must be paid by the two publicly owned bridges, Mr. Hunter admitted that the Carquinez Bridge is at a distinct disadvantage. (Tr. 339.)

Finally, on this subject, the record shows the following

question and answer (Tr. 340):

"Q. (by Mr. Thelen): But don't you believe that in fixing the rates for the Carquinez Bridge consideration should be given to the facts as they actually apply to that bridge instead of perhaps being led astray by making comparison with some other bridge as to which the circumstances are entirely different?

"A. (by Mr. Hunter): Oh, yes, I think the Carquinez Bridge should stand on its own feet regardless of what hap-

[fol. 66-52] pens to the other two bridges."

In the closing testimony in the case, Mr. Lester S. Ready, witness for American Toll Bridge Company, submitted as the last exhibit in the case (Exh. 142) a statement of "Items of Cost of American Toll Bridge Company not Chargeable to Tolls under San Francisco-Oakland Bay Bridge Operations."

In this exhibit, Mr. Ready set forth some of the items of cost which are incurred by the Carquinez and the Antioch

bridges which are not chargeable to toils in the case of the San Francisco-Oakland Bay Bridge. Thus—

Operating and maintenance expenses (Tr. 836; Exh. 142):

By arrangement between the California Toll Bridge Authority and the Reconstruction Finance Corporation, the Bay Bridge pays these expenses entirely out of gasoline taxes. The tolls do not pay any part of these expenses. The Carquinez and Antioch Bridges, on the other hand, must pay out of their tolls an average of \$171,331 per year for these items of expense.

## Taxes (Tr. 837; Exh. 142):

- (1) County—the Carquinez and Antioch Bridges pay an average of \$78,668 per year: the Bay Bridge nothing.
- [fol. 66-53] (2) 2% on Gross Revenue—the Carquinez and Antioch Bridges pay an average of \$33,548 per year: the Bay Bridge nothing.
- (3) State Franchise—Carquinez and Antioch Bridges, \$33,027; Bay Bridge nothing.
- (4) Federal Income—Carquinez and Antioch Bridges, \$162,587: Bay Bridge, nothing.

The foregoing items are based on costs which would be incurred under present tolls.

# Depreciation Annuity (Tr. 837; Exh. 142):

The maturity of the bonds sold to rance the Bay Bridge is 40 years while the money invested by American Toll Bridge Company necessarily must be retired before the expiration of the Company's toll bridge franchises in 1948. The excess cost to American Toll Bridge Company for this item averages \$142,771 per year.

Mr. Ready pointed out that if American Toll Bridge Company were relieved from paying out of its tolls costs which the San Francisco-Oakland Bay Bridge is not required to pay out of its tolls, the American Toll Bridge Company

would save an average of \$621,932 per year, or over the remaining 10 years of the franchises a total of \$6,219,320.

This saving would reduce the toll revenue required by the Company in the average sum of 36.9 per cent. Such a saving would make possible tolls even lower than those now charged by the Bay Bridge. (Tr. 837; Exh. 142.) [fol. 66-54] The foregoing computations do not go into the further fact that the cost of money to the two publicly owned San Francisco Bay Bridges was far less than the cost of money to American Toll Bridge Company in connection with the construction of its two toll bridges. (Tr. 839-40.)

It thus appears that the Commission based its Decision on an analogy which cannot properly be applied. A decision based on such a false foundation is unfair and unjust and should not be permitted to stand.

#### VIII

·Violation of Constitutional and Statutory Rights

American Toll Bridge Company specifically challenges the validity of the Commission's said Decision and Order on the ground that they violate the rights of said Company under the following provisions of the Constitution of the United States, the Constitution of California and the Statutes of California:

- 1. Section 1 of Article XIV of the Amendments to the Constitution of the United States:
- 2. Paragraph 1 of Section 10 of Article I of the Constitution of the United States;
- 3. Sections 13 and 14 of Article I of the Constitution of California;
- 4. Section 16 of Article I of the Constitution of California;
- [fol. 66-55] 5. The Act of March 14, 1881 of the Laws of California (St. 1881; ch. 68, p. 76); and
- 6. Sections 2845 to 2848, inclusive, and Section 2872 of the Political Code of the State of California.

Wherefore, petitioner prays that a rehearing be granted and that thereupon said Decision and Order of February 8, 1938 be annulled and set aside.

Dated at San Francisco, California, this 17th day of February, 1938.

Dunn, White & Aiken, by B. R. Aiken and Bauer E. Kramer; Breed, Burpee & Robinson, by Harold C. Holmes, Jr.; Thelen & Marrin, by Max Thelen, Attorneys for American Toll Bridge Company.

(Here follows one paster, Exhibit A. side folio 66-56)

		1938	1939
	1. Operating Revenue 2. Total Direct & General Expenses 3. State Franchise & Federal Inc. Tax.	\$1,250,339 284,584 114,548	\$1,270,256 284,983 45,129
	4. Total	399.132	330,112
	5. Net	851,207 88,431 245,167	940,144 162,550 406,663
	Total	333.598	569,213
1	8. Balance for Div. & Stock Retirements. 9. Dividend @ 8% on Par Value of Stock less Refunds. 1. Stock, Beginning of Year. 1. Stock, Retired. 2. Dividends @ 8% per annum for Period June 1, 1927 to Dec. 31, 1935 (without Interest on Same) Exh. 126.	517.609 302.150 3.776.873 215.459	370,931 284,913 3,561,414 \$6,018

13. Unretired Stock plus Unpaid Dividends as of End of Fanchises.

78A

Exhibit A. Estimated Operating Results

# American Toll Bridge Company-1938-1948

Under Rates as per CRC. Decision

							1			
9	1940	1941	1942	1943	1944	1945	1946	1947 .	194%	Total
.256 .983 .129	\$1,290,173 285,711 51,198	\$1,312,083 286,149 57,698	\$1,335,983 282,827 69,128	\$1,357,892 268,196 90,645	\$1,379,801 268,634 98,762	\$1,401,709 269,072 115,652	\$1,423,618 269,840 131,219	\$1,445,527 270,278 140,529	\$210,067 58,185 148,135	\$13,677,448 2,828,459 1,052,638
.112.	336;909	343,847	351,950	348,841	367,396	384,724	401,059	410,807	206,320	3.881.097
.144 .550 :663	953,264, 144,833 420,417	968,236 122,260 448,125	984,033 98,198 474,708	1,009,051 72,715 499,375	1,012,405 45,902 519,583	1,016,985 17,325 315,000	1,022,559	1.034,720	3,747	9.796,351 752,214 3.329,038
0.213	565,250	570,385	572,906	572,090	565,485	332,325		*******	* *	4,081,252
.931 .913 .414 .018	388,014 278,032 3,475,396 109,982	397,851 269,233 3,365,414 128,618	411,127 258,944 3,236,796 152,183	436,961 246,769 3,084,613 190,192	446,920 231,554 2,894,421 215,366	684,660 214,324 2,679,055 470,336	1,022,559 176,698 2,208,719 845,861	1,034,720 109,029 1,362,858 925,691	3,74 437,167	5,715,099 2,371,646 437,167 3,339,706
						0 0 1 0 0 000 0				2,404,600
				*******						2,841,767



#### EXHIBIT "E" TO PETITION

#### Decision No. 30649

# BEFORE THE RAILROAD COMMISSION OF THE STATE OF

#### Case No. 4259

In the Matter of the Investigation upon the Commission's Own Motion into the Rates, Charges, Contracts, Classifications, Rules and Regulations of AMERICAN TOLL BRIDGE COMPANY Covering Its Operation of the Toll Bridge Over the Carquinez Straits Between the Counties of Contra Costa and Solano

#### ORDER DENYING REHEARING

Petition for a rehearing of our Decision No. 30,612 in the above entitled matter having been filed by American Toll Bridge Company; the Commission having carefully considered the said petition and each and every allegation contained therein, and being of the opinion that no good cause for the granting of a rehearing is therein made to appear,

It is Ordered that the said petition for rehearing be and

the same is hereby denied.

Dated, San Francisco, California, February 21, 1938.

Wallace L. Ware, Leon O. Whitsell, Frank R. Devlin, Ray C. Wakefield, Ray L. Riley, Commissioners.

• Certified as a True Copy. H. G. Mathewson, Secretary, Railroad Commission, State of California.

#### [fol. 68] IN SUPREME COURT OF CALIFORNIA

## [Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF REVIEW-Filed February 25, 1938

#### Preliminary Statement

The Railroad Commission's order reduces petitioner's tolls for automobiles and passengers on foot or in vehicles over the Carquinez Bridge 31.7%.

The inevitable effect of this order, if it becomes effective, will be to force a similar reduction in the tolls for said services as to petitioner's Antioch Bridge, now operating in the red: yet the Railroad Commission closed its eyes to that situation and confined its attention to the only part of petitioner's single, unified transportation system which is being operated at a profit.

[fol. 69] The decision is based on the false analogy of the two publicly owned and operated bridges across San Francisco Bay and in total disregard of the fact that expenses amounting to an average of \$621,932.00 per year must be paid out of the tolls of the Carquinez Bridge, not one dollar of which is paid out of the tolls of the San Francisco-Oak-

land Bay Bridge.

The decision violates the Railroad Commission's own heretofore unbroken line of decisions (a) making allowances for the reasonable cost of developing the business of a new utility over a reasonable period of time and (b) fixing a rate of return somewhat in excess of the cost of money to the utility. The decision is a glaring departure from the Railroad Commission's policy of fair treatment to public utilities subject to the Railroad Commission's jurisdiction.

The Railroad Commission's order violates each provision of the Constitution of the United States and the Constitution and statutes of California referred to in the petition for rehearing filed by petitioner with the Railroad Commission (Exh. "D" attached to petition for writ of review). We invite particular attention to the following points and authorities.

## The Law

·I

The Commission's order confiscates petitioner's prop-[fol. 70] erty in the Carquinez Bridge and deprives petitioner of its property in said bridge without due process of law.

Section 1, Article XIV, Amendments to Constitution of United States.

Sections 13 and 14, Article I, Constitution of California.

Smyth v. Ames, 169 U. S. 466, 547.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 757. Whiteox v. Consolidated Gas Co., 212 U. S. 19, 41.

Das Moines Gas Co. v. Des Moines, 238 U. S. 153, 165.

Denver v. Denver Union Water Co., 246 U. S. 178, 191.

Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 287.

Georgia Railway & Power Co. v. Railroad Commission, 262 U. S. 625, 631.

Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679, 690, 692.

Board of Commissioners v. New York Telephone Co., 271 U.S. 23, 31.

McCardle v. Indianapolis Water Co., 272 U. S. 400, 410.

Los Angeles Gas & Electric Corporation v. Railroad Commission of California, 289 U. S. 287, 305.

Southwestern Bell Telephone Co. v. Port Smith, 294 Fed. 102.

Southern Bell Telephone Co. v. Railroad Commission, 5 Fed. (2d) 77, 87.

Consolidated Gas Co. v. Prendergast, 6 Fed. (2d) 243.

[fol. 71] New York & Richmond Gas Co. v. Prendergast, 10 Fed. (2d) 167, 178.

Brooklyn Borough Gas Co. v. Prendergast, 16 Fed. (2d) 615, 638.

#### H

The Commission's order confiscates petitioner's property in the Carquinez and the Antioch Bridges and deprives petitioner of its property in said two bridges without due process of law.

See authorities cited under I-also .

Coney v. Broad River Power Co., 171 So. Car. 377, 172 S. E. 437, and cases there cited.

#### III

The Commission's order, even though it were in form within the limits of the power delegated to the Commission, nevertheless violates petitioner's rights under Section 1 of Article XIV of the Amendments to the Constitution

of the United States, because it is arbitrary, unjust and unreasonable.

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547.

State of Washington v. Fairchild, 224 U. S. 510, 524. Great Northern Railway Company v. State of Minnesota, 238 U. S. 340, 345.

Northern Pacific Railway Company v. Department of Public Works of Washington, 268 U. S. 39, 45.

- [fol. 72] The arbitrariness of the order is shown by the fact that the Commission violated unbroken lines of its own prior decisions by
- (1) Selecting the more profitable portion of a single, unified transportation system and fixing rates for that portion of the system in disregard of the less profitable portion of the system;
- (2) Refusing to make any allowance whatever for the reasonable cost, during a reasonable period of time, of developing the business of a new utility (going concern value); and
- (3) Cutting the rate of return far below even the cost of money to the utility.

(See decisions of Railroad Commission of California cited in Petition for Rehearing).

#### IV.

The Commission's order impairs the obligation of petitioner's contract with the State of California that the rates set forth in the ordinance of the Board of Supervisors of Contra Costa County granting the franchise for the construction and operation of the Carquinez Bridge shall not be reduced by the public authorities for 20 years unless the public authorities shall have found that the receipts from tolls in any one year have yielded more than 15% on the cost of construction or erection of the toll bridge or the fair cash value thereof, together with the reasonable cost of all [fol. 73] necessary repairs and maintenance of the toll bridge. The yield has never been and is not now anywhere near as high as 15%.

1. For the contract, see

Political Code, sec. 2845, 2846, 2872.

Laws of California, Act of March 14, 1881 (St. 1881, ch. 68, p. 76).

2. A franchise creates a vested right by contract.

Russell v. Sebastian, 233 U. S. 195.

Oro Electric Corporation v. Railroad Commission of California, 169 Cal. 466.

Postal Telegraph-Cable Company v. Railroad Com-

mission of California, 200 Cal. 463.

3. The State may delegate to a subordinate political subdivision, such as a city or a county, the right not merely to regulate the rates of a public utility but also to enter into a contract with such utility on the subject of rates. Such contract, when entered into, can not be impaired without violation of State and Federal Constitutional provisions.

Section 10, Article I, Constitution of the United

States.

Section 16, Article I, Constitution of California.

Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 382.

Vicksburg v. Vicksburg Waterworks Company, 206 U. S. 496, 508.

[fol. 74] Railroad Commission of California v. Los Angeles Railway Corporation, 280 U. S. 145, 151-2.

4. The State of California delegated to the Board of Supervisors of Contra Costa County the right to enter into said contract and the Board of Supervisors exercised the delegated authority when it adopted the ordinance granting the Carquinez Bridge franchise and setting forth therein the tolls to be charged by the grantee of the franchise.

See authorities under (1) and Ordinance No. 171 of Board of Supervisors of Contra Costa County (ap-

pendix to Exh. 19 herein).

It is respectfully submitted that the Writ of Review should issue.

Dated at San Francisco, California, this 25th day of Feb-

ruary, 1938.

Thelen & Marrin, by Max Thelen; Dunn, White & Aiken, by B. R. Aiken, and Bauer E. Kramer, Breed, Burpee & Robinson, by Harold C. Holmes, Jr., Attorneys for Petitioner.

# [fol. 75] IN SUPREME COURT OF CALIFORNIA

# [Title omitted]

Affidavit for Temporary Stay and for Suspension of Decisions and Orders of Railroad Commission During Pendency of Writ of Review—Filed February 25, 1938

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Will F. Morrish, being first duly sworn, deposes and says: That he is the President of American Toll Bridge Company, a corporation, the petitioner in the above entitled proceedings; that said corporation has for a number of years been engaged and is now engaged in the ownership and operation of a toll bridge known as the Carquinez Bridge, across the Carquinez Straits; between Crockett in [fol. 76] Contra Costa County and Valona in Solano County, and of a toll bridge known as the Antioch Bridge, across the San Joaquin River near Antioch, between the Counties of Contra Costa and Sacramento; that each of said bridges was constructed and is being operated under a franchise granted by ordinance of the Board of Supervisors of the County of Contra Costa; that the Carquinez Bridge franchise was granted by ordinance of February 5, 1923, which will expire on or about March 5, 1948, and that the Antioch Bridge franchise was granted by ordinance of June 4, 1923, which will expire on or about July 4, 1948.

That among the tolls heretofore charged by said American Toll Bridge Company for transportation over each of said toll bridges, under authority of said ordinances, have

been and now are the following:

Passengers (7 years of age and older) on foot or in yehicles
Auto only

That in its order and decision of February 8, 1938, referred to in the petition for writ of review on file herein, the Railroad Commission reduced said tolls, effective March 1, 1938, so as to read:

Passengers (7 years of age and older) on foot or in vehicles 45

Auto only 45

That said order, if it becomes effective, will reduce the revenues of American Toll Bridge Company from said serv[fol. 77] ices to the extent of 31.7%.

That on February 17, 1938 American Toll Bridge Company filed with the Railroad Commission its petition for rehearing on said decision and order and that on February 21, 1938 the Railroad Commission made and filed its order

denying said petition for rehearing.

That under said decisions and orders, unless a temporary stay is granted by this Court, as provided by Section 68 of the Public Utilities Act, as amended (St. 1933, ch. 442, p. 1157), immediate and irreparable injury, loss and damage will result to said American Toll Bridge Company before notice can be served and hearing had on motion for stay and suspension of the Railroad Commission's said decisions and orders, for the following reasons:

If said decisions and orders are permitted to become effective pending the hearing and decision on said Company's motion for a suspension of said decisions and orders upon notice and after hearing, said American Toil Bridge Company will be required to charge immediately, beginning on March 1, 1938, the reduced tolls set forth in the Railgoad Commission's said decisions and orders: that the amount in which the revenues from said reduced tolls will be below the revenues from the tolls heretofore and now in effect for said services will be an average of at least \$650.00 per day: [fol. 78] that in the event this Court shall finally enter judgment setting aside the Railroad Commission's said decisions and orders, said American Toll Bridge Company will have no means of collecting the amount of said reduction, or any portion thereof, from the persons who, in the meantime, would have paid said reduced tolls; and that said sums of money, averaging \$650.00 per day, and all thereof, will be irretrievably lost to said American Toll Bridge Company maless this Court grants a temporary stay restraining the operation of the Railroad Commission's said decisions and orders until hearing and determination of said application for stay and suspension upon notice, as aforesaid; and that the damage to said American Toll Bridge Company will otherwise be immediate and irreparable.

That under said decisions and orders, unless the same are stayed and suspended upon notice, as provided by said Section 68 of the Public Utilities Act, as amended, during the pendency of writ of review before this Court, great and irreparable damage will otherwise result to said American Toll Bridge Company, for the following reasons:

That an average of at least \$750.00 per day of revenue will be lost to said American Toll Bridge Company on each [fol. 79] and every day during the pendency of said writ of review before this Court and that in the event that this Court should thereafter make and enter its judgment setting aside said decisions and orders of the Railroad Commission, said American Toll Bridge Company would have no means of recovering said money or any thereof from any corporations or persons which in the meantime had paid said reduced tolls, and said sums averaging \$750.00 per day, and all thereof, would have been irretrievably lost to said American Toll Bridge Company; and that the damage to said American Toll Bridge Company would be great and irreparable.

That should this Court not grant said temporary stay and also said stay or suspension after notice and hearing, and should the Court thereafter enter judgment setting aside said decisions and orders of the Railroad Commission, said American Toll Bridge Company would have no remedy whereby it could recover the losses which it had sustained through said erroneous and unlawful decisions and orders of the Railroad Commission, and that the only adequate remedy is (a) an order of this Court granting a temporary stay restraining the operation of said decisions and orders to the time of hearing and determination of said motion upon notice, as aforesaid, followed by (b) an order staying and suspending the operation of said decisions and orders [fol. 80] during the pendency of said writ of review before this Court, all as provided in said Section 68 of the Public Utilities Act, as amended.

Will F. Morrish.

Subscribed and sworn to be ore me this 24th day of February, 1938. Lulu P. Loveland, Notary Public in and for the City and County of San Francisco, State of California. (Notarial Seal.)

[fol. 81] Received copy of attached documents this, 25th day of February, 1938.

Ira H. Rowell, Attorney for Respondents.

[fols. 82-85] (Order of Supreme Court of California granting temporary stay of decisions and orders of Railroad Commission, filed on February 25, 1938, omitted in printing.)

[fols. 86-88] (Suspending bond on temporary stay, approved by the Supreme Court of California and filed on February 25, 1938, omitted in printing.)

[fols. 89-90] (Order to show cause why operation of decisions and orders of Railroad Commission should not be stayed or suspended during pendency of writ of review, filed February 25, 1938, omitted in printing.)

[fols. 91-93] (Notice of application for stay and suspension of decisions and orders of Railroad Commission, filed February 25, 1938, omitted in printing.)

[fols. 94-95] (Affidavit of service of copies of petiten for writ of review and other specified documents, filed on February 28, 1938, omitted in printing.)

[fols. 96-98] (Order of Supreme Court of California resetting hearing on order to show cause and extending order granting temporary stay of decisions and orders of Railroad Commission, filed on March 2, 1938, omitted in printing.)

[fol. 99] [File endorsement omitted]

[fol. 100]. IN SUPREME COURT OF CALIFORNIA

# [Title omitted]

Answer of Railroad Commission to Petition for Writ of Review-Filed March 12, 1938

The petition here presented is one requesting the Court to issue a writ of review to consider the validity of a ratefixing order issued by the Commission on February 8, 1938, covering the rates or tolls charged patrons of the Carquinez

toll bridge.

Upon the filing of the petition, the Court made an order temporarily staying the enforcement of the rate order in question, as permitted by Section 68 of the Public Utilities Act.

[fol. 101] As contemplated by the Rules of Court, the respondent Commission respectfully presents its answer to said petition.

It seems unnecessary here to make an extended factual statement to supplement the material contained in the petition, inasmuch as the issues presented resolve themselves largely into questions of law alone. We shall endeavor first of all to state briefly what we conceive to be the grounds upon which the petitioner challenges the Commission's order, and thereafter shall set forth the facts of record to the extent necessary in order that the exact points of controversy may be made entirely clear.

# General Issues Presented

It plainly appears from the petition that the validity of the Commission's action is challenged upon two quite distinct legal grounds, both founded upon a claimed invasion of rights guaranteed by state and federal constitutions.

# Confiscation:

The first general ground of attack is that the rate order will result in a taking of petitioner's property "without due process of law." In other words, it is claimed that the rates fixed are so low as to result in confiscation. This claim is premised upon factual allegations to the effect that the rates prescribed permit of a net return of but 6.6 per cent upon the fair value of the bridge property, less than what is alleged to be a fair rate of return.

[fol. 102] As a further claimed denial of due process, the petitioner seems to allege also that the Commission's action in fixing rates for the Carquinez bridge alone, refusing to treat that bridge and petitioner's Antioch bridge as a single rate making unit, was arbitrary and capricious action.

We shall presently analyze these contentions in the light of both the facts of record and rate making precedent established in similar cases. We shall show that the claim of confiscation is without substantial foundation.

# Impairment of Contract:

The second ground of attack is quite distinct from the first. It is a challenge to the jurisdiction of the Commission to regulate bridge rates or tolls except to the limited extent heretofore permitted to the Supervisors of the County which granted the bridge franchise. That franchise, it is argued, constitutes a contract between the peti-Stioner and the public. Asserting first that certain Political Code provisions and general laws in force at the time the petitioner received its franchise from the County of Contra Costa must be read into the franchise itself, and be taken to have limited the power formerly vested in the Supervisors of that County to fix bridge tolls or rates, it is next contended that such franchise contract has been impaired in violation of Constitutional guarantees because the Railroad Commission has refused to recognize any limitations upon [fol. 103] its rate-fixing authority.

The respondent Commission acknowledges that this issue is an important one. But it should here be pointed out that this was not a question either discussed in the proceeding before the Commission or decided by it. The Commission properly proceeded to fix petitioner's bridge tolls in accordance with the duty imposed upon it by the legislative act of 1937 amending Section 2(dd) of the Public Utilities Act so as to include toll bridges as public utilities and to make them subject to rate regulation by this Commission. And in the performance of that duty, the Commission was guided in its action by the test applicable in all utility ratefixing proceedings, the only guiding principle specified in the Public Utilities Act,—namely, that the rates charged shall be "just and reasonable." (Section 13.)

In presenting this answer to the petition, counsel for the respondent consider it their duty to dispute the contention thus advanced by the petitioner. However, because of the limited time permitted for an examination into the authorities applicable to this question, we shall not endeavor here to do more than point to the particular problem involved.

# The Question of Confiscation

Although the petition charges that the effect of the Commission's order is to deprive the bridge company of its property, it contains no allegations of fact to support such [fol. 104] a conclusion. For any statement informing us of the factual errors alleged to have been committed, we must turn to the Exhibit "D" attached to the petition, which is the application filed with the Commission for a rehearing of the rate order. Here it seems to be the contention that, when looking at the result of operations on the Carquinez bridge alone, the minimum value to be accorded the bridge property is \$8,632,622 (Page 20); that upon this value or rate base the Company is entitled to an annual return of "somewhat in excess of 9 per cent" (Page 29). This would be equivalent to a net revenue of at least \$776,936 annually.

In comparison to these claims, it appears that the petitioner estimates the net revenue which it will obtain under the rates prescribed by the Commission to be only \$570.298 (Table, Page 24), a rate of return on a rate base of \$8,632,622 of but 6.6 per cent. Hence, the claim of confiscation.

The Commission in its decision said in effect that it was allowing a rate of return of approximately 7½ per cent on the investment in the bridge, and that the rates fixed estimated to yield such a return were considered reasonable.

Concisely stated, the points to be discussed as briefly as possible are these:

Net Revenue.—The petitioner implies that the Commission has been arbitrary in its estimate of revenues and ex[fol. 105] renses under the rates prescribed. This is far
from the true fact. It may easily be demonstrated that the
Commission accepted the judgment expressed by petitioner's own witness, corrected only for an error in respect
to federal taxes, an error which the Commission deemed
to be an obvious one.

Rate of Return.—The Commission differs materially from the petitioner as to what constitutes a reasonable rate of return. We shall show that a return of 7.5 per cent, is more than ample when tested by the standards usually applied by commissions and courts alike.

Property Value.—The minor difference that may exist as to the proper rate base to be accepted trises mainly out of the petitioner's demand for the capitalization of early operating losses, a claim which may not legally be recognized.

# Operating Revenue

The revenues to be obtained under any rate schedule are necessarily conjectural. All witnesses agreed, however, that a reduction in existing tolls would result in a stimulation of traffic. The Commission's witness first proposed a flat fare of 50 cents per car without extra charge for passengers not exceeding five in number. All estimates of in-[fol. 106] creased traffic were based upon this suggested rate. But the Commission's final conclusion was that a somewhat higher rate would be advisable, and therefore prescribed a schedule of 45 cents per car and 5 cents per passenger, an average of about 56 cents for car and passengers.

To obtain a comparison of the anticipated results under these two rate structures, let us look at the estimates presented by the petitioner itself. They appear in the table following, a table prepared from Exhibit "D" attached to the petition, and from Exhibit 134 introduced before the Commission by petitioner's witness, Mr. Ready.

[fol 107]

Ехнівіт "D" то Ретутіом

Carquinez Bridge American Toll Bridge Company

Exhibit 134. Company's Witness 1

Actual Revenues and Expenses 1937.
Commission

	Rates Year	Old Rates	1938	1930	1940	1961	1942	1943
Operating Revenues: Toils. Renta and Miscellaneous.		\$1,544,691	1 \$1,060,036 \$		\$1,097,230 8,243	\$1,117,687 \$1	-	-
Total Revenue Operating Expenses: Operation and Maintenance Gross Revenue Tax (2%) General Expense	1,143,520 146,700 22,706 63,852	1,522,934 135,084 31,114 149,70	1,068,279 146,700 21,201 63,852	1,086,877 146,700 21,573 63,991	1,105,473 146,700 21,945 64,365	1,125,930	146,247 146,240 22,800 64,575	
Total Direct & General Expense Amortization of Irvestment.	233,258	316,168	231,753	232,264	223,010	233,486	204,075	223 .606
Total Expenses (ex. Income Tax).  Net Income Before Income Taxes. Federal Income Tax. State Franchise Tax.	430,985 703,535 108,511 24,726	\$22.896 1,030,639 66,223	438,480 620,799 108,511 24,726	438,991 647,886 45,073 9,236	439,737 665,736 40,779 9,821	440,215 685,715 50,427 11,858	440 802 707 445 54 809 13 402	8422
Total Income Taxes	133,237	66,223	133,237	54,300	50,600	62,285	68,301	7
Total All Expenses Net Revenue Rate Base Rate of Return	573,222 570,298 8,632,622 6,6%	589,118 963,816 7,949,537 12,12%	571,717 496,562 7,949,537 6,25%	488,300 598,577 7,949,537 7,47%	450,337 615,136 7,949,537 7,74%	622,500 623,430 7,949,537 7,84%	509, 103 639, 144 7, 949, 537 8, 64%	507,883 660,822 7,949,537 8,31%

[for 108] It requires only a brief analysis of the figures in the preceding table to throw light upon the single difference existing between the Company and the Commission as to the net revenue to be expected. It lies in the item of income taxes.

Let it first be noted that the results shown for the 1937 year are actual, at rates actually charged. The revenues shown for 1938 and succeeding years, as estimated by Mr. Ready for the Company, were at the flat 50 cent rate, whereas the 1938 revenue appearing in the first column is the Company's estimate at the higher rates prescribed by the Commission.

Turning to the item of income taxes included as an operating expense, it will be seen that the amount included for 1938 in both columns 1 and 3 is \$133,237, yet the net income shown before inclusion of such taxes is \$703,535 when computed at the rates ordered by the Commission, and \$629,799 when computed at a flat fifty cent rate. And it will be seen that for the year 1937, when the net income before revenue taxes reached the sum of \$1,030,039, the petitioner has included a tax of only \$66,223.

The explanation of this is obvious. The petitioner seeks to allocate its federal income tax upon the earnings of the 1937 year to its expenses charged against the 1938 year. Such an accounting for taxes is contrary to the uniform system of accounts prescribed for all other classes of utili-[fol. 109] ties, and lacks foundation in law and principle.

For example, in the case of Faweus Machine Co. v. U. S., 282 U. S. 375, the Supreme Court quotes from the Treasury Regulations as follows:

"Federal income \* \* taxes are deemed to have been paid out of the net income of the taxable year for which they are levied."

And the Court further stated in reference to the point raised by the appellant in the case:

Petitioner asserts that article 845 was based on the erroneous assumption that income taxes are payable out of the net income of the taxable year for which they are levied.

The United States replies that it is, and since 1914 it has been, required that a taxpayer shall keep his books and make his returns on a basis which will reflect true income;

that while the taxes for any year are not payable until the following year, good accounting practice requires an accrual of them as a liability of the current year's business; and that the regulation in question was not only reasonable, but necessary for proper administration of the revenue act.

"The position of the government is sound. A corporation cannot claim to have accumulated any net income in any year until provision is made for taxes accrued, based on net

income for the same year."

The true federal income tax to be included for the year 1938 in the first column of the above table will not exceed \$56,000. Thus the total state and federal net revenue tax, including the extraordinarily high state franchise tax of \$24,726 for this particular year, will be fully \$52,500 below the amount stated, and the net income for return upon [fol. 110] capital correspondingly increased to at least \$622,798.

We need not here attempt to demonstrate the accuracy of this computation, for a reference to the petitioner's own estimates of this item of expense for succeeding years, as they appear in the table above, demonstrate the sufficiency

of the allowance.

#### Rate of Return

In the petition it is alleged (Page 5) that the Commission fixed a rate of return far below the cost of money. In Exhibit "D" attached (Page 26) it is stated that both Mr. Ready, testifying for the petitioner, and Mr. Coleman, for the Commission, had computed the cost of that portion of the Company's total capital obtained through the issue of bonds at 9.71 per cent.

The meaning of this term, "cost of money", and the use to which applied by the Commission in determining what may reasonably be taken as a fair rate of return upon a

utility property, requires brief explanation.

In the financing of both its bridges, the American Toll Bridge Company in 1925 issued \$6,500,000 twenty year bonds. Of these, \$4,500,000 were 7 per cent first mortgage bonds, and \$2,000,000 were 8 per cent second mortgage bonds. It sold these bonds at a discount of \$650,000 and recorded on its books a selling expense of \$23,853. In addition, it delivered a stock bonus of \$800,000 to the syndicates which sold these bonds. Altogether, the discount and ex-

[isl. 111] penses included by the witnesses as being related to those bonds totaled \$1,590,492, and it was the amortization of this latter sum over a period of twenty years, plus the annual interest on those bonds, which they testified would result in an effective interest rate of 9.71 per cent.

The Commission cannot agree that any such interest rate then represented or now represents, the cost of bond money to the petitioner. By 1935 the Company had reduced its bonded debt to \$4,180,500, and in that year it redeemed the full amount by paying a premium of \$131,300. It then issued \$4,300,000 of 5½ per cent bonds due serially from 1936 to 1945. Of the latter, there presently are outstanding \$3,600,000.

Thus, it is the annual carrying cost of these bonds, not the original issue, that may properly be considered in determining what may be taken as a fair rate of return today. If a public utility can enjoy a rate of return upon its entire capital fully equal to the cost of that portion bearing fixed interest obligations, it will have a return adequate "to maintain and support its credit", as was said in the leading case of Bluefield Waterworks Co. v. Public Service Comm., 262. U. S. 679, 692, "and enable it to raise the money necessary for the proper discharge of its public duties."

The evidence clearly shows that the petitioner's annual fixed charges on its outstanding bonds, including both the interest charge and the straight line amortization of the [fol. 112] discount and selling expense incurred, result in an annual effective interest rate of but 6.35 per cent.

The Commission believes that the "cost of money", when so computed, bears a real significance to the rate of return which should be allowed upon total capital. And when in other utility rate cases the Commission has applied the "cost of money" test, it has made its computation upon this basis, not upon the cost of bonds no longer outstanding, as the petitioner seemingly would contend.

But the petitioner would probably contend further that because the old bonds were retired before maturity it has not been fully reimbursed for the premiums then paid, or for the full amortization of the discount and expense incurred. By the same process which it employs to compute an annual cost on the old bonds of 9.71 per cent, including the amortization of bonus stock, it might claim a total of \$571,821 of such unrecouped charges. In fact, the actual amount withdrawn by the Company from its treasury in the

redemption of its old bonds was but \$205,827. The most that can equitably be claimed is the right to restore this sum to the treasury by amortizing it over the life of the new bond issue. Even then, the cost of the petitioner's bond

money remains less than 7 per cent.

[fol. 113] The Commission does not concede, therefore, and certainly the petitioner has not demonstrated, that the rate of return which it will obtain on its entire invested capital is less than a fair rate of return, or so low as to result in confiscation. We need not refer to the rates of return commonly approved for utilities of other classes. It should be noticed, however, that in Clark's Ferry Bridge Co. v. Penn, P. S. Comm. (1934) 291 U. S. 227, the Supreme Court held that a 7 per cent return upon a toll bridge property was not confiscatory.

# [fol. 114] Property Value

The petitioner fails anywhere to make an averment as to the fair value of its Carquinez bridge property for rate fixing purposes. In its petition for rehearing (Exhibit "D")

it uses the figure of \$8,632,622 as a rate base.

But a reference again to the table heretofore set forth showing Mr. Ready's estimates of net return, and to the Commission's decision where the various estimates of cost are presented (Exhibit "C", page 10), it will be seen that the total investment in the bridge structure, lands and fixtures, was \$7,949,954. That is exactly the figure which the Commission considered as the base upon which to test the reasonableness of the rates prescribed, although expressing the opinion that certain book costs totaling approximately \$375,000 could rightfully be questioned.

The petitioner's net revenue for the first year under the rates prescribed being not less than \$622,798, as heretofore shown under the heading of "Operating Revenue," it may be seen that the Commission provided for a rate of return of 7.8 per cent upon the full investment in the bridge property.

It is true that the petitioner placed in evidence an estimate of the cost to reproduce the Carquinez bridge property today. But it has at no time urged that this estimate represents the value of the property to be accepted as a rate base. [fol. 115] It is true also that it contends for the inclusion of a specific additional sum of \$382,668 to reflect "interest during construction." This, however, is a claimed capital

allowance for interest not actually paid out during the course of construction, it being a hypothetical interest charge on capital obtained from sources other than bond money, and which did not actually carry a fixed interest charge during the construction period. Whatever merit there may be to the inclusion in the rate base of an assumed interest charge during construction, not actually paid, the petitioner cannot justly claim any fundamental error in the rate base actually adopted by the Commission, for in any event the Commission would have been justified, as it indicated, in reducing the book costs in an amount in excess of the additional interest claimed.

And the petitioner asserts the right to include in the capital base a further sum of \$300,000 for "cost of developing the business", or what it denominates a "going concern" value. In answer to this claim, it need be said merely that going concern value, whatever place it properly may have in the valuation of some public utility properties, cannot be measured by the losses incurred during the development stages of the business. As the Supreme Court of the United States said in Los Angeles Gas & Elec. Corp. v. Railroad Commission, 287 U. S. 289, 313:

[fol. 116] "Nor does this recognition of going value countenance a mere attempt to recoup past losses. " Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, any more than past profits can be used to sustain confiscatory rates for the future."

# The Rate Making Unit

The petitioner asserts that the Commission should have considered the two bridges which it owns and operates, the one at Antioch and the one at Carquinez, as a single rate making unit.

Let it be conceded that the bridge which the petitioner owns and operates at Antioch is earning a considerably lower rate of return than the bridge at Carquinez. Nevertheless, the Commission was not violating any constitutional right when it inquired into the reasonableness of the Carquinez bridge alone.

For example, in the case of Wabash Valley Electric Co. v. Young, 287 U. S. 488, it was determined that a state commission may fix the rates of an electric utility for each of

the municipal areas served. In Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, where a company was operating both an elevated and a subway transportation system. It was held that the two systems could be considered as separate rate making units.

The respondent Commission has always exercised a discretion as to what in each case should be taken as the rate making unit. In telephone cases it has frequently used the [fol. 117] metropolitan exchange areas as the rate unit. For gas and electric companies, because of the interrelation of facilities and service, it has usually considered the entire service area, but has always separated one type of service from the other. In the regulation of water companies serving more than one municipal area, it has treated the respective systems as distinct rate fixing units. And it has always considered the passenger commutation services across the San Francisco Bay by electric lines and ferries as services separate from the other railway operations conducted by the same companies.

Therefore, the Commission's action in the instant case did not constitute either an abuse of discretion or a reversal of any rate making precedent.

# Conclusion as to Confiscation

In concluding this reply to the petitioner's claim of confiscation resulting from the Commission's rate order, it is submitted that no substantial grounds have been advanced in support of the claim, and that, upon this point the Court should deny the writ of review requested.

# [fol. 118] . Impairment of Con ract

Apparently the petitioner concedes the jurisdiction of the Railroad Commission to institute an investigation into the reasonableness of the bridge tolls, and to prescribe other rates. In other words, it concedes that a toll bridge is a public utility and that the Legislature could at any time divest the county supervisors of whatever power they may have had to fix tolls by transferring such power to the Railroad Commission.

The crux of petitioner's argument, as it appears to us. is that, the county supervisors possessed only a, limited power to fix bridge tolls and therefore the power now vested in the Commission is similarly limited.

The legislative act of 1937 (Chap. 896) which conferred jurisdiction upon the Commission, reads as follows, the underscored words being the additions then made to subsection (dd) of Section 2 of the Public Utilities Act, and subsection (ee) being new.

"(dd) The term 'public utility,' when used in this act, includes every common carrier, foll-bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

"(ee) The term 'toll-bridge corporation,' when used in this act, includes every private corporation or private person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any bridge or appurtenance thereto, used for the [fol. 119] transportation of persons or property for compensation in this State/"

We shall quote also from the two Political Code sections upon which the petitioner rests the contention that the franchise granted in 1923 by the Supervisors of Contra Costa County should be construed as a contract exempting the petitioner for a period of twenty years from any downward revision of its rates by the Supervisors, and now by the Commission, unless it be shown that the rate of the return from the bridge has exceeded 15 per cent. The provisions quoted at page 42 of Exhibit "D" are these:

Sec. 2845. "The board of supervisors granting authority to construct a toll-bridge or to keep a public ferry, must at the same time:

"3. Fix the rate of toils which may be collected for crossing the bridge or ferry which may raise annually an income not exceeding fifteen per cent on the actual cost of the construction or erection of the bridge or ferry, and such additional income as will provide for the annual cost of operation, maintenance, amortization and taxes of the bridge or ferry."

Sec. 2846. "License tax and rate of tolls, how fixed.— The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

The petitioner asserts in its memorandum of authorities, page 6, that (1) a "franchise creates a vested right by constract;" (2) that the state may delegate to the county the [fol. 120] right to "enter into a contract" with a "public utility", on the subject of rates; and (3) that the state did delegate to the Supervisors of Contra Costa County the power to contract in respect to toll bridge rates.

The respondent doubts that any of these propositions are sustainable under the laws of this State. It concedes, of course, that in some states there may be such a thing as a franchise contract covering the matter of public utility rates, one binding upon the utility and the public alike, and one which is not subject to impairment without invasion of constitutional guarantees. There are many decisions so holding, but we believe there are none arising under the constitution and laws of this State.

The first question to be determined in each case is whether the state law permits the subordinate state body to bind itself by contract, and the second question is whether the franchise granted was actually intended to be, and can be construed to be, a mutually binding contract.

One of the most recent decisions of the Supreme Court of the United States upon this question, and one arising under the California laws, is that of Railroad Commission v. Los Angeles Railway Corp., 280 U. S. 145. In recognition of the right of a state to empower its subordinate governmental authorities to enter into rate contracts with public utilities, the Court said:

[fol: 121] "It is possible for a state to authorize a municipal corporation by agreement to establish public service rates, and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service fur-

nished by public utilities. Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 382, 46 L. ed. 592, 605; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 508, 515, 51 L. ed. 1155, 1160, 1163; St. Cloud Pub. Serv. Co. v. St. Cloud, 265 U. S. 352, 355, 68 L. ed. 1050, 1053. And where a city, empowered by the state so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. Detroit v. Detroit Citizens' Street R. Co. supra, (184 U. S. 389, 46 L. ed. 608). And, in such case, the courts may not relieve the atility from its obligation to serve at the agreed rates however inadequate they may prove to be. St. Cloud Pub. Serv. Co. v. St. Cloud, supra.

However, the Supreme Court then proceeded to point out that any such power claimed to have been delegated to a political subdivision to surrender by contract its continuing authority to regulate rates is a power which must be expressly conferred, and never to be implied. We quote further from this decision as follows:

"This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. Georgia R. & Power Co. v. Decatur, 262 U. S. 432, 438, 67 L. ed. 1065, 1073. Our attention has not been called to any California decision, and we think there is none, which decides ... that the state legislature has empowered Los Angeles to establish rates by contract. This court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the state from time to time to prescribe rates. a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the state to authorize [fol. 122] the bargaining away of its power to tax. dence Bank v. Billings, 4 Pet. 514, 561, 7 L. ed. 939, 955; Railroad Commission Cases, 116 U. S. 307, 325, 29 L. ed. 636; 642, 6 Sup. Ct. Rep. 334, 388, 1191; Freeport Water Co. v. Freeport, 180 U. S. 587, 599, 45 L. ed. 679, 688, 21 Sup. Ct. Rep. 493; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 210, 48 L. ed. 406, 411, 24

Sup. Ct. Rep. 241; Puget Sound Traction Light & P. Co. v.

Reynolds, 244 U. S. 574, 579, 61 L. ed. 1325, 1329.

"This court applied the established rule in Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50. That company's franchise was granted under the Broughton Franchise Act, which provided that every such franchise 'shall be granted upon the conditions in this act provided and not otherwise.' The city charter gave power to its council to fix charges for telephone service. The franchise stated that the rates should not exceed specified amounts. An ordinance prescribing lower rates was passed. The company brought suit for injunction against its enforcement on the ground that the ordinance violated the contract clause of the Constitution of the United States. The city insisted that it had not been empowered by the . state to make such a contract, and this court upheld its con-It said (p. 273): 'The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized . . . The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required.' And, dealing with the charter provision there relied on by the company, the court said (p. 274); 'The charter gave to the council the power 'by ordinance' to regulate telephone service and the use of telephones within the city, . . and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power \* \* but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement."

With these general principles in view, we must approach the problem here presented by a search for some constitu[fol. 122½] tional or statutory delegation of the power to contract in respect to toll bridge rates, remembering that it is a power which must be clearly expressed, not to be implied.

Looking first at the state constitution, instead of finding any such delegation of authority, we find exactly the contrary. Section 21 of Article I provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

In Section 23 of the same article it is provided:

"This enumeration of rights shall not be construed to impair or deny others retained by the people."

Looking next at the various general laws and code provisions relating to the regulation of toll bridges, we can find no express grant of power to county supervisors which may be taken as a power to contract away the right of the people to demand just and reasonable utility rates.

The statute of 1881, p. 76, which still remained in effect on March 19, 1923, when petitioner's franchise was obtained, provided that Boards of Supervisors should have the power, among others, as follows:

"The power to grant franchises to individuals, or corporations, to construct bridges, and the regulation of tolls thereon, shall be exercised by the county on the left bank of all streams." (Emphasis supplied.)

Political Code Section 2848, in effect since 1872, reads as follows:

[fol. 123] . "Whenever the board of supervisors are about to fix the license tax and rate of tolls on a bridge or ferry they must make inquiry into the present actual cash value and the cost of all necessary repairs and maintenance. thereof, and for that purpose may examine, under oath, the owner or keeper of the same, and other witnesses, and the assessed value of the bridge or ferry on the assessment roll of the county. When the estimate of the board is made, if the same is not agreed to by the owner or keeper of the bridge or ferry, the same must be fixed by three commissioners, one to be appointed by the board of supervisors. one by the owner and keeper, and the third by the county judge, who must hear testimony and fix such value and cost according to the facts, and report the same to the board of supervisors under oath. In all estimates of the fair eash value of the bridge or ferry the value of the franchise mustnot be taken into consideration."

And Political Code Section 2845, as it read before amendment in 1923, provided that one of the powers of county supervisors shall be:

- "1. Fix the amount of a penal bond to be given by the person or corporation owning or taking tolls on the bridge or ferry for the benefit of the county and all persons crossing or desiring to cross the same, and provide for the annual renewal thereof;
  - "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three nor over one hundred dollars per month, payable annually;
  - "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year;
  - "4: Make all necessary orders relative to the construction, erection, and business of licensed toll bridges or ferries which they have by law the power to make. The Board of Supervisors may, at any time they see fit, authorize and [fol. 123½] maintain fords across any water within any distance of any licensed toll bridge or ferry."

From a reading of these laws in effect at the time the Supervisors of Contra Costa County granted to petitioner its franchise of February 5, 1923, one would conclude that there was manifested the clear intent to give to counties a continuing rate making power over toll bridges. And it might be said that the language used in these statutes, to use the words of the Home Telephone Company case above quoted, was "entirely unfitted to describe the authority to contract."

The source from which the petitioner purports to find a contracting power in the Boards of Supervisors is Political Code Section 2845 as amended in 1923, and the next following Section 2846, already quoted. The petitioner would read the latter section as an express covenant to the effect that the toll rates set forth in the franchise itself shall not within twenty years be reduced by the Supervisors unless the earnings had exceeded 15 per cent.

We need not here attempt to search for the legislative intent underlying these various sections of the Political Code. What we have attempted to do is merely to point to the problem involved. We believe that when the Legislature in 1937 declared that the rate fixing power should henceforth be vested in the Railroad Commission, without in any way qualifying that power, it must have thought that it was merely transferring to the Commission an authority [fol. 124] already committed to the Supervisors without qualification. And it must have assumed that the authority which it theretofore had given to Boards of Supervisors was a continuing power to fix rates, not one to barter away by entry into a rate contract for a term of years.

The respondent Commission submits, therefore, that when it undertook to perform the duty recently imposed upon it to fix rates for the petitioner's bridge, it rightfully considered its duty to be exactly the same as when undertaking the fixation of rates for all classes of utilities. It realized and expressed in its opinion that some departure from the usual standards was warranted. But the Commission had no power to override the legislative intent by imposing upon itself such a restriction of its rate making authority as to recognize the existence of a franchise contract exempting the petitioner from a reduction of its rates below

a given rate of return.

Respectfully submitted, Ira H. Rowell, Roderick B. Cassidy, George E. Howard, Attorneys for Respondents.

Dated, San Francisco, California, March 11, 1938.

[fol. 125] Due service and receipt of a copy of the within is hereby admitted this 11th day of March, 1938.

Thelen & Marrin, Dunn, White & Aiken, Breed, Burpee & Robinson, Attorneys for Petitioner.

[fol. 126] [File endorsement omitted]

[fol. 127] IN SUPREME COURT OF CALIFORNIA

## [Title omitted]

REPLY OF AMERICAN TOLL BRIDGE COMPANY TO ANSWER OF RAILROAD COMMISSION TO PETITION FOR WELT OF REVIEW— Filed March 23, 1938

This Reply is being filed in accordance with the provisions of Section 5 of Rule XXVI of the Rules for the Su-

preme Court and the District Courts of Appeal, on the subject of "Railroad Commission Cases".

We understand that the purpose of this Rule is to make sure that the Court is fully and properly advised as to the issues involved in pending Petitions for Writ of Review, so that the Court may act advisedly in passing on such petitions and in directing the Railroad Commission to certify its record to the Court (Sec. 67, Public Utilities Act). [fol. 128] We do not understand that it would be proper for Petitioner to enter into a detailed analysis of the evidence in support of its position on the various issues, when the record is not as yet before the Court. Under the Public Utilities Act, the only procedure to get the Commission's record before the Court is to have the Court issue a writ of review and direct the Commission "to certify its record in the case to the Court" (Sec. 67, Public Utilities Act).

That is what Petitioner is respectfully requesting the Court to do.

Accordingly, we shall confine this Reply to pointing out briefly the issues and to drawing attention to the Court's procedure and responsibilities in connection therewith.

#### 1. The Issues

The Answer herein admits that Petitioner has challenged the validity of the Railroad Commission's orders and decisions on the ground that they violate rights of Petitioner under both the Constitution of California and the Constitution of the United States (Answer, p. 2 lines 14-18). That these grounds are substantial appears from the Petition of American Toll Bridge Company for Rehearing before the Railroad Commission (Exhibit D to Petition for Writ of Review herein) and from the Petition for Writ of [fol. 129] Review, as well as from the Railroad Commission's Answer to the Petition.

The Railroad Commission's Answer concedes that Petitioner has raised the following issues, among others:

# (a) Confiscation of Property-Carquinez Bridge

Petitioner has pointed out in its Petition for Rehearing before the Railroad Commission and in its Petition for Writ of Review herein that, in fixing the tolls to be charged by Petitioner, for automobiles and passengers on foot or in vehicles moving over said Carquinez Bridge, the Railroad Commission

- (1) Omitted substantial items of property used and useful in the operation of said Bridge;
- (2) Made erroneously low allowances for other items of property so used;
- (3) Failed and refused to make any allowance for the cost of developing the business or going concern value;
- (4) Fixed an erroneously low figure as representing the fair value of Petitioner's property used in the public service:
- (5) Made inadequate allowance for operating expenses necessarily to be paid;
- (6) Fixed a rate of return far below the actual cost of [fol. 130] money used by Petitioner in the construction of said Bridge; and
- (7) Fixed tolls which will not yield to Petitioner a fair return upon the fair value of its properties used and useful in the public service of owning and operating said Carquinez Bridge.

The Railroad Commission's Answer herein admits that these issues have been urged and presented by Petitioner (Answer, pp. 2-16).

When the Railroad Commission's record is before this Court, we shall make detailed response to each point appearing in the Commission's Answer under the issue of "Confiscation of Property—Carquinez Bridge".

# (b) Arbitrary and Unfair Exclusion of Antioch Bridge

In said Petition for Rehearing before the Railroad Commission and in the Petition for Writ of Review herein, Petitioner urges that the Railroad Commission arbitrarily, unfairly and unjustly picked the Carquinez Bridge out from Petitioner's single and unified transportation system, consisting of both the Carquinez and the Antioch Bridges, and fixed tolls for the Carquinez Bridge alone, which is the more profitable portion of Petitioner's said single and unified transportation system, and by thus excluding from said decision and order the Antioch Bridge, fixed tolls

which, when applied to both bridges, as they inevitably [fol. 131] and necessarily must be, will deprive Petitioner of a fair return upon the fair value of the property devoted by it to its single, unified transportation system—all in violation of Petitioner's rights under both the State and the Federal Constitutions.

The Railroad Commission's Answer herein admits that this issue has been raised by Petitioner (Answer, pp. 17-18).

# (c) Impairment of Contract Obligations

Petitioner urged in its Petition for Rehearing before the Railroad Commission and in its Petition for Writ of Review herein that the Commission's decisions and orders impair the obligation of Petitioner's contract with the Board of Supervisors of Contra Costa County, in which the Board, acting under express authority conferred by the State Legislature, contracted with the grantees of the franchises for the construction and operation of the Carquinez and the Antioch Bridges that during the term of 20 years after the granting of said franchises the public authorities would not reduce the tolls set forth in the ordinance granting said franchises unless the Board of Supervisors should first have found that said tolls were vielding to the Toll Bridge Company a rate of return in excess of 15% on the actual cost of the construction or erection of said bridges and such additional income as will provide for the annual cost of operation, maintenance, amortization and taxes of said bridges. The Commission's action is assigned by Petitioner to be in violation of its rights under [fol. 132] both the State and the Federal Constitutions (Petition for Rehearing, pp. 39-47; Petition for Writ of Review, pp. 7-8).

The Railroad Commission's Answer herein admits that Petitioner has challenged its decisions and orders on this ground (Answer, pp. 19-27):

In order to determine this issue, which the Railroad Commission's Answer concedes to be "an important one" (Answer, p. 4, 1. 2-3), it will, of course, be necessary for this Court to have before it the franchise ordinance, which is part of the Railroad Commission's record.

At page 21 of their Answer (lines 11-13), counsel for the Commission frankly concede that "there are many decisions" in other States holding in accord with the Petitioner on this important issue, but counsel say that "we believe that there are none arising under the constitution and laws of this State". However, counsel cite no California case contrary to Petitioner's position nor do they state any reason why the law in California of this question should be different from the law in the other states.

In Railroad Commission of California v. Los Angeles Railway Corporation, 280 U. S. 145, the Supreme Court of the United States found that, on the facts of that case, the State of California had not delegated to the City of Los Angeles the authority to contract as to street railway fares. However, at page 151, the Court stated very clearly [fol. 133] the principle which Petitioner believes to be the law, as follows:

"It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. Detroit v. Detroit Citizens R. Co., 184 U. S. 368, 382. Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508, 515. Public Service Co. v. St. Cloud, 265 U. S. 352, 355. And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service. the latter may not be required to serve for less even if the specified rates are unreasonably high. Detroit v. Detroit Citizens' R. Co., supra, 389. And, in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates however inadequate they may prove to be. Public Service Co. v. St. Cloud, supra."

The contract in the present case arises out of statutory provisions specifically limited to public toll-bridges and ferries, which provisions are entirely different from those before the court in the Los Angeles Railway Corporation case.

At page 26 of its Answer, the Railroad Commission indulges in assumptions as to what the Legislature may or may not have thought when in 1937 (St. 1937, ch. 896, p. 2473) it amended the Public Utilities Act so as to include, for the first time, "toll-bridge corporations" among the

public utilities to be regulated by the Railroad Commission. On this subject, the Answer says (p. 26):

[fol. 134] "We believe that when the Legislature in 1937 declared that the rate fixing power should henceforth be vested in the Railroad Commission, without in anyway qualifying that power, it must have thought that it was merely transferring to the Commission an authority already committed to the Supervisors without qualification. And it must have assumed that the authority which it theretofore had given to Boards of Supervisors was a continuing power to fix rates, not one to barter away by entry into a rate contract for a term of years."

Regardless of what, if anything, the Legislature "thought" and what, if anything, they "assumed", the Legislature, of course, could not by this action impair the contract which an earlier Legislature had authorized the Board of Supervisors of Contra Costa County to make and which the Board actually did make under the authority so conferred.

We have in mind the statement very recently made by Chief Justice Hughes in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, decided on April 27, 1936, that—

"Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands" (p. 52).

And we, in common with millions of other plain American citizens, find solace and hope in that other statement made by the great Chief Justice in the same case (p. 51):

"Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

[fol. 135] Turning from the Legislature to its own position in the matter, the Railroad Commission then says in the concluding paragraph of its Answer (p. 27):

"The respondent Commission submits, therefore, that when it undertook to perform the duty recently imposed upon it to fix rates for the petitioner's bridge, it rightfully considered its duty to be exactly the same as when undertaking the fixation of rates for all classes of utilities. It realized and expressed in its opinion that some departure from the usual standards was warranted. But the Commission had no power to override the legislative intent by imposing upon itself such a restriction of its rate making authority as to recognize the existence of a franchise contract exempting the petitioner from a reduction of its rates below a given rate of return."

In this paragraph, the Commission "assumes" that it was the "legislative intent" that it should violate contract obligations. No such legislative intent appears in the 1937 amendments to the Public Utilities Act.

It is not a question of whether the Commission shall "impose upon itself such a restriction of its rate making authority as to recognize the existence of a franchise contract \* \* \*." It is rather a question of whether the Commission shall impose upon the Petitioner a gross and irreparable wrong by a clear violation of its rights under its contract with the Board of Supervisors of Contra Costa County.

We regret that the Commission did not frankly recognize that it took its new responsibilities with reference to toll-bridge corporations subject to their existing contract [fel. 136] rights with the public authorities.

The Legislature did not instruct the Commission to do

otherwise; nor could it have lawfully done so.

In addition to the foregoing points which the Commission's Answer concedes that the Petitioner has raised, the following additional issues were tendered by Petitioner in its Petition for Rehearing before the Railroad Commission and in its Petition for Writ of Review herein; and Petitioner urged that in these respects, also, the Railroad Commission's orders and decisions violate Petitioner's rights under the State and Federal Constitutions:

(d) Petitioner pointed out that any reduction in tolls charged for transportation on the Carquinez Bridge must-necessarily be followed by a similar reduction in the tolls of the Antioch Bridge and that the application of the tolls fixed by the Commission would clearly confiscate the Single, unified transportation system of Petitioner consisting of the Carquinez and the Antioch Bridges (Petition for Rehearing, pp. 30-34; Petition for Writ of Review, p. 6).

- (e) Petitioner pointed out that the Carquinez and Antioch Bridges are "wasting assets" because at the expiration of the franchises in 1948 the bridges will become the properties of the Counties of Contra Costa and Solano without the payment of any compensation to Petitioner: that unless by that time Petitioner has fulfilled its obligations to its bondholders and its stockholders it will never [fol. 137], be able to do so; and that under the tolls now fixed by the Railroad Commission the Company will fail by a very large sum to earn sufficient revenue to enable it to meet its obligations to its bondholders and stockholders (Petition for Rehearing, pp. 35-39; Petition for Writ of Review, pp. 6-7).
  - (f) Finally, Petitioner pointed out that, from the start to the finish, the case before the Railroad Commission was an effort to reduce the tolls charged for automobiles and passengers over the Carquinez Bridge down to the tolls charged by the two publicly owned and operated bridges across San Francisco Bay and that this analogy was patently false and misleading. (Petition for Rehearing, pp. 47-54; Petition for Writ of Review, p. 8).

Such reduction might be "popular" but it would be a deprivation of Petitioner's property without due process of law and a violation of other guarantees under both the State and the Federal Constitutions.

The foregoing are the issues before the Court in the above entitled proceeding.

 Petitioner Stands Ready to Meet the Railroad Commission on Each Issue When the Commission's Record Has Been Certified to the Court

Each of the foregoing issues depends, in part, on evidence contained in the record made before the Rail; oad [rol. 138] Commission.

That record is not now before this Court and can be brought before the Court only in the manner provided by Section 67 of the Public Utilities Act, namely, by an order from the Court directing that the writ issue and that the Railroad Commission "certify its record in the case to the court".

When this has been done, Petitioner stands ready to submit to the Court, by brief and argument, in as helpful a

manner as possible, the evidence which bears on each issue raised by Petitioner, as well as the applicable principles of law and the leading decisions establishing the same.

 It is the Court's Duty, in this Case, to Exercise an Independent Judgment on the Law and the Facts

From the issues raised by the Petitioner and also from the statements contained in the Railroad Commission's Answer, it is obvious that this is a case which falls squarely within the provisions of the Statute of 1933 (St. 1933, ch. 442, p. 1157) adding to Section 67 of the Public Utilities Act the following paragraph:

"In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determina[fol. 139] tion of the said constitutional question shall not be final."

It is, of course, clear that in order to be able/to exercise its independent judgment on the facts, it will be necessary for the Court to have before it the Commission's record containing those facts.

4. Petitioner's Prayer for Stay of Railroad Commission's Orders and Decisions During Pendency of Writ of Review

On February 25, 1938, this Court made its order granting a temporary stay of the decisions and orders of the Railroad Commission to and including ten days after the entry of the order, conditioned upon the filing by Petitioner of a suspending bond in the sum of twenty-five thousand dollars. Such bond was approved and filed.

On March 4, 1938, this Court made its further order, on written stipulation, resetting the hearing on the order to show cause for April 5, 1938, and extending the order theretofore made so as to grant a temporary stay until the hearing and determination of Petitioner's application for a

stay and suspension upon notice, as provided by Section 68 of the Public Utilities Act.

Attached to the Petition for Writ of Review on file herein. is the affidavit of Will F. Morrish, President of American Toll Bridge Company, setting forth the facts on which Petitioner asked both for an initial temporary stay and for [fol. 140] the suspension of the decisions and orders of the Railroad Commission during the pendency of the writ of review. From said evidence, it appears that unless said decisions and orders are staved and suspended upon notice, during the pendency of the writ of review before this Court, great and irreparable damage will result to Petitioner for the reason that otherwise an average of at least seven hundred and fifty dollars (\$750.00) per day of revenue will be lost to Petitioner on each and every day during the pendency of said writ of review before this Court, none of which moneys Petitioner could thereafter. recover from the corporations or persons who, in the meantime, had paid the reduced tolls.

In the Petition for Writ of Review herein (Par. XII), Petitioner offers to file, in connection with said stay or suspension after notice during the pendency of the writ of review before this Court, a suspension bond or bonds in such form and amount or amounts as this Court may approve and to keep such records and accounts, verified by oath, as may, in the judgment of this Court, show the amount to be charged or received by Petitioner in excess of the charges allowed by said decisions and orders of the Railroad Commission, together with the names and addresses of the corporations and persons to whom overcharges will be refundable in the event that said orders and decisions of the Railroad Commission are upheld.

# [fol. 141] We respectfully request that the Court

- 1. Issue its writ of review directing the Railroad Commission to certify its record in the case to the Court (Section 67. Public Utilities Act); and
- 2. Make its order s aying and suspending the decisions and orders of the Railroad Commission during the pendency of said writ before the Court (Section 68, Public Utilities Act).

Dated at San Francisco, California, this 22nd day of March, 1938.

Respectfully submitted, Thelen & Marrin, by Max Thelen; Dunn, White & Aiken, by B. R. Aiken, by Bauer E. Kramer; Breed, Burpee & Robinson, by Harold C. Holmes, Jr., Attorneys for American Toll Bridge Company.

[fol. 142] Receipt of copy of written Reply acknowledged this 23rd day of March, 1938.

Ira H. Rowell, Roderick B. Cassidy, George E. Howard, Attorneys for Respondents.

[fol. 143] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

[Title omitted]

WRIT OF REVIEW-Filed April 6, 1938

To the Railroad Commission of the State of California and to Wallace L. Ware, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield and Leon O. Whitsell, as members of and constituting the Railroad Commission of the State of California:

Whereas, it manifestly appears to us by the verified petition of the above named petitioner on file herein, that in a certain proceeding entitled "In the Matter of the Investigation upon the Commission's own motion, into the rates, charges, contracts, classifications, rules and regulations of American Toll Bridge Company covering its operations of the toll bridge over the Carquinez Straits between the counties of Contra Costa and Solano, Case No. 4259", you, [fol. 144] exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy and adequate remedy; and being therefore willing to be certified of the said action or proceeding:

We Therefore, Command You, that you certify fully and return to this Court within ten (10) days from the date of the issuance of this writ a full and complete record of all proceedings in said Case No. 4259, for the purpose of hav-

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ing the lawfulness of your decisions and orders in said proceeding inquired into and determined by this Court.

We further command you that you make return to this writ before the Supreme Court of the State of California en banc, at its Courtroom in San Francisco, California, on May 27, 1938 at 10:00 o'clock a. m.

Witness, the Honorable William He Waste, Chief Justice of our Supreme Court, at San Francisco, California, this 6th day of April, 1938.

\_\_\_\_\_, by \_\_\_\_\_\_, Clerk. \_\_\_\_\_, by \_\_\_\_

[fol. 145] Received unsigned copy of this document this 6th day of April.

I. H. Rowell, Atty. for R. R. Com.

[fols. 146-151] (Order of Supreme Court of California staying and suspending decisions and orders of Railroad Commission pending writ of review, filed April 6, 1938, omitted in printing.)

[fols. 152-155] (Suspending bond during pendency of writ of review, filed April 6, 1938, approved by the Supreme Court of California, omitted in printing.)

[fol. 156] [File endorsement omitted]

[fol. 157] IN SUPREME COURT OF CALIFORNIA

[Title omitted] ..

RETURN TO WRIT OF REVIEW AND MEMORANDUM OF DOCUMENTS—Filed April 14, 1938

I. H. G. Mathewson, Secretary of the Railroad Commission of the State of California, respondent herein, do hereby certify to the Supreme Court of the State of California:

That as Secretary of the Railroad Commission of the State of California I have kept a true and complete record of the pleadings, transcript of testimony, exhibits, record and proceedings before the Railroad Commission entitled as follows:

In the Matter of the Investigation, on the Commission's own motion, into the operations, rates, charges, classifications, rules, regulations, contracts and practices, or any thereof, of American Toll Bridge Company, San Francisco [fol. 158] Bay Toll Bridge Company, and Dumbarton Bridge Co., toll bridge corporations, as defined by Statutes 1937, Chapter 896. Case No. 4244.

In the Matter of the Investigation upon the Commission's own motion, into the rates, charges, contracts, classifications, rules and regulations of American Toll Bridge Company covering its operation of the toll bridge over the Carquinez Straits between the Counties of Contra Costa

and Solano. Case No. 4259.

That attached hereto are the pleadings, transcript of testimony, exhibits and record of said proceedings before the Railroad Commission of the State of California.

In Witness Whereof, I have hereunto set my official signature and affixed the seal of the Railroad Commission of the State of California, this 6th day of April, 1938.

. H. G. Mathewson, Secretary, Railroad Commission of the State of California. (Seal.)

[fol. 159]

[Title omitted]

#### MEMORANDUM OF DOCUMENTS

#### Pleadings

1. Order Instituting Investigation into operations, etc., of American Toll Bridge Company, et al., filed August 27, 1937, Case No. 4244.

2. Notice of Hearing setting Case No. 4244 for hearing on

October 26, 1937, dated September 22, 1937.

3. Order Instituting Investigation into rates, etc., of American Toll Bridge Company covering its operation of the toll bridge over the Carquinez Straits between Contra Costa and Solano Counties, filed October 4, 1937. Case No. 4259. Hearing Set for October 26, 1937.

4. Decision No. 30612 issued by Railroad Commission on

February 8, 1938.

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 Petition of American Toll Bridge Company for rehearing, filed February 17, 1938.

6. Order Denying Rehearing, issued February 21, 1938.

Decision No. 30649.

#### [fcl. 160]

#### Exhibits

- Ex. 1.—Historical Summary—Cost of Financing—Assets and Liabilities—Revenues and Expenses, filed October 26, 1937.
- 8. Ex. 2.—Analysis of operating results of Carquinez Bridge for period May 21, 1927 (Date of Opening) to September 30, 1937, inc. relative to traffic, revenue and distribution of revenue, filed October 26, 1937.
- 9. Ex. 3.—Study dealing with cost of constructing Carquinez bridge, filed October 26, 1937.
- 10. Ex. 4.—Population Statistics, S. F. Chamber of Commerce (Chart), filed December 2, 1937.
- 11, Ex. 5.—Population growth, 1900-1945, S. F. and S. F. Bay area, S. F. Chamber of Commerce, filed Dec. 2, 1937.
- 12. Ex. 6.—Automobile registrations, S. F. Chamber of Commerce (Chart), filed December 2, 1937.
- 13. Ex., 7.—Automobile registrations, 1920-1945, S. F. and S. F. Bay Area, S. F. Chamber of Commerce, filed December 2, 1937.
- 14. Ex. 8.—Population record of Alameda County and principal cities therein for the years 1900 to 1940, inclusive, filed December 2, 1937.
- 15. Ex. 9.—Motor Vehicle Registration in Alameda County for years 1921-1936, inc., comparative record of passenger automobiles registered in Alameda County and the State of California for years 1921-1936, inc., filed December 2, 1937.
- 16. Ex. 10.—Vallejo, Population Statistics, filed December 2, 1937.
- 17. Ex. 11.—Population Statistics, Pittsburg Chamber of Commerce.
- 18. Ex. 12.—Population Statistics, Richmond Chamber of Commerce.
- Ex. 13.—Population Statistics of San Leandro, Dec.
   1, 1937.
- [fol. 161] 20. Ex. 14.—Population Statistics, Contra Costa County, filed December 2, 1937.

21. Ex. 15.—Graph showing growth of population Eastern Contra Costa County, filed December 2, 1937.

22. Ex. 16.—Study dealing with cost of reproduction, new; Misc. physical costs; interest during construction for the Carquinez bridge, filed December 2, 1937.

23. Ex. 17.-Study of construction costs in connection

with the Antiock bridge, filed December 2, 1937.

- 24. Ex. 18.—Origin and destination survey at Carquinez bridge, Antioch bridge, Martinez-Benicia ferry on Sunday, Oct. 17, 1937, and Wednesday, Oct. 20, 1937, filed December 2, 1937.
- 25. Ex. 19.—Analysis of the operating results of the Carquinez bridge, with estimates of future travel and revenue, filed December 2, 1937.

26. Ex. 20.—Population Statistics, Sonoma Valley Chamber of Commerce, filed December 2, 1937.

27. Ex. 21.—Balance Sheet, Income account, detail of Revenues and Expenses, filed December 2, 1937.

28. Ex. 22.—Estimated cash requirements, Carquinez and

Antioch bridges, filed December 2, 1937.

29. Ex. 23.—Supplement to Exhibit No. 19, "Analysis of the operating results of the Carquinez bridge, with estimates of future travel and revenue, filed December 21, 1937.

Exhibits 24 and 25, Photographs, see Note below.

30. Ex. 26.—Blueprint, "Proposed highway bridge across Carquinez Strait, from Valona to Morrow Cove, etc.", filed December 22, 1937.

Exhibits 27 to 103, Photographs, see Note below.

31. Ex. 104.—American Toll Bridge Co., fender system at Carquinez bridge, rock embankment, Sheet 1. (Tracing.) Filed December 23, 1937.

32. Ex. 105.—Sheet No. 2 of Exhibit No. 104. Filed December 23, 1937.

[fol. 162] Exhibits 106 to 116, Photographs, see Note below.

33. Ex. 117.—Reasonable historical cost, Carquinez Bridge, American Toll Bridge Company, filed December 23, 1937.

34. Ex. 118.—Reproduction of Carquinez Bridge—New—American Toll Bridge Company, filed December 23, 1937.

35. Ex. 119.—Summary, Comparison of interest during construction, Carquinez bridge, filed December 23, 1937.

36. Ex. 120.—Reasonable Historical Cost, Antioch bridge, American Toll Bridge Company, filed January 10, 1938.

37. Ex. 121.—Reproduction of Antioch bridge—new American Toll Bridge Company, filed January 18, 1938.

38. Ex. 122.—Copy of first War Department permit, ap-

proved April 17, 1923, filed January 18, 1938.

39. Ex. 123.—27 letters passing between War Department

and American Toll Bridge Company.

40. Ex. 124.—Agreement of January 24, 1925, between American Toll Bridge Co. and Raymond Concrete Pile Co., filed January 18, 1937.

41. Ex. 125.-Letter, January 29, 1925, American Toll Bridge Co., to Raymond'Concrete Pile Co., filed January 18,

1938.

42. Ex. 126.—Estimate of cash requirements, by years, for the period from January 1, 1938 to June 30, 1948, filed January 18, 1938.

43. Ex. 127.—Estimated value, Rodeo Vallejo Ferry

Company, Franchise, filed January 19, 1938.

44. Ex. 128.—Earning statement, Martinez-Benicia Ferry & Transportation Co., 1935 to 1937, filed Jan. 19, 1938.

45. Ex. 129.—Cost of money and fair rate of return, American Toll Bridge Company, filed January 19, 1938.

46. Ex. 130. Distribution of automobile traffic, Carquinez and Antioch bridges and Martinez Benicia Ferry, American Toll Bridge Company, filed January 19, 1938.

47. Ex. 131.—Reported and estimated traffic and revenue under present rates, Carquinez and Antioch bridges, 1926

to 1948, filed January 19, 1938.

48. Ex. 132.—Estimated earnings, American [fol. 163] Toll Bridge Company, 1926-1948, Present tolls, filed January 19, 1938.

49. Ex. 133.-American Toll Bridge Company-Estimated increase in automobile traffic which would result from reduction of tolls. Suggested by J. G. Hunter, filed January 19, 1938.

50. Ex. 134.—Analysis on Traffic and revenue 1936 and 1937—Carquinez Bridge, present rates and rates proposed by J. G. Hunter, filed January 19, 1938.

51. Ex. 135.—Summary of Earnings, Carquinez bridge— American Toll Bridge Company, filed January 19, 1938.

52. Ex. 136.—Estimated taxable revenues, deductions therefrom and federal taxes thereon, by years, for period from January 1, 1938 to June 30, 1948, filed January 28, 1938.

53. Ex. 137.—Letter dated April 20, 1925, to American

Toll Bridge Co., signed by Chas. Derleth, Jr.

54. Ex. 138.—Drawing C-4, dated Jan. 8, 1934, filed January 28, 1938.

55. Ex. 139.—Drawing No. C-5, dated Dec. 27, 1923, filed

January 28, 1938.

56. Ex. 140.—Drawing No. D-9, Sept. 14, 1925, filed January 28, 1938.

57. Ex. 141.—Drawing No. D-11, Oct. 10, 1925, filed Jain-

uary 28, 1938.

58. Ex. 142.—Items of cost of American Toll Bridge Company not chargeable to tolks under San Francisco-Oakland Bay Bridge operation.

Note.—Exhibits 24, 25; 27 to 103, inclusive; 106 to 116, inclusive, are photographs showing the progressive construction of the Carquinez Bridge. These photographs may be found in Folders II and III in this proceeding.

# [fol. 164] Transcripts

Vol. 1. Transcript of Testimony, Hearing at San Francisco, October 26, 1927. (Pages 1 to 49, inclusive.)

Vol. 2. Transcript of Testimony, Hearing at San Fran-

cisco, (Pages 50 to 220, inclusive.) December 2-3, 1937.

Vol. 3. Transcript of Testimony, Hearing at San Francisco, (Pages 221 to 354, inclusive.) December 21, 1937.

Vol. 4. Transcript of Testimony, Hearing at San Francisco, (Pages 355 to 469, inclusive) December 22, 1937.

Vol. 5. Transcript of Testimony, Hearing at San Fran-

cisco, (Pages 470 to 577, inclusive) December 23, 1937.

Vol. 6. Transcript of Testimony, Hearing at San Francisco, (Pages 578 to 685, inclusive) January 18, 1938.

Vol. 7. Transcript of Testimony, Hearing at San Fran-

cisco, (Pages 686 to 778, inclusive) January 19, 1938.

Vol. 8. Transcript of Testimony, Hearing at San Francisco, (Rages 779 to 842, inclusive) January 28, 1938.

Folder I. Pleadings.—Exhibits Nos. 1 to 23, inclusive; Exhibit No. 26; Exhibit No. 104, Exhibit No. 105; Exhibits Nos. 117 to 142, inclusive.

Folder II. Photographs.—Exhibits Nos. 24, 25; 27 to 79, inclusive.

Folder III. Photographs.—Exhibits Nos. 80 to 103, inclusive: 106 to 116, inclusive.

Folder IV. Transcript of Testimony.—8 Volumes, pp. 1 to 842, inclusive.

[fol. 165] IN SUPREME COURT OF CALIFORNIA, IN BANK

## [Title omitted]

ORDER OF SUBMISSION—Filed September 27, 1938
Matter (review) submitted.

Seawell, Acting Chief Justice. -

Dated September 26, 1938.

| File endorsement omitted. |

[fol. 166] IN SUPREME COURT OF CALIFORNIA, IN BANK

S. F. No. 16,006

AMERICAN TOLL BRIDGE COMPANY (a Corporation).

Petitioner,

Railroad Commission of the State of California, Wallace L. Ware, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield and Leon O. Whitsell, as Members of and Constituting the Railroad Commission of the State of California, Respondents

Opinion-Filed September 27, 1938

# · By the Court:

[fol. 167] The purpose of this proceeding is to review and order of the Railroad Commission reducing the tolls for automobiles and passengers over the Carquinez bridge. The main question is whether the rates so fixed are so low as to be confiscatory. Other questions also require determination.

On February 5, 1923, the board of supervisors of Contra Costa county granted to the Rodeo-Vallejo Ferry Company a twenty-five year franchise to construct and operate the Carquinez bridge across Carquinez straits between Crockett in Contra Costa county and Valona in Solano county. On June 4, 1923, the same board of supervisors granted to Delta Bridge Corporation a twenty-five year franchise to construct and operate a bridge across the San Joaquin

river near Antioch, between the counties of Contra Costa and Sacramento. Both franchises expire in 1948, at which time the property rights and title in and to the bridges revert to the adjacent counties without the payment of compensation to the franchise holders.

Those in control of the Rodeo-Vallejo Ferry Company organized the American Toll Bridge Company which be came the owner of the Carquinez bridge franchise on July 2, 1923. That company also acquired the franchise to construct and operate the Antioch bridge as well as all of the outstanding stock of the Rodeo-Vallejo Ferry Company and of the Martinez-Benicia Ferry and Transportation Company which operates ferries between Martinez and Benicia. The Antioch bridge was opened to traffic in January, 1926, and the Carquinez bridge in May, 1927. The Antioch bridge crosses the stream at a point 25 miles above and east of the Carquinez bridge. Between the two bridges, about eight miles east of the Carquinez bridge, the ferry boats owned by the American Toll Bridge Company ply between the two shores:

The power and duty of granting authority to construct and operate a toll bridge over water dividing two counties [fol. 168] and to fix the tolls to be collected for the use thereof formerly resided in the board of supervisors of the county situate on the left bank descending the stream or arm of the bay. (Pol. Code. secs. 2843, 2845.) The board of supervisors of Contra Costa county, at the beginning of operations of the Carquinez bridge, fixed the tolls for automobiles at sixty cents and ten cents for passengers in vehicles or on foot. The bridge was in operation at this scale of tolls at the time of the reduction ordered by the commission.

By Statutes of 1937, page 2473, the jurisdiction of toll bridges was transferred to the Railroad Commission. On August 27, 1937, the commission on its own motion commenced in one proceeding the investigation of the tolls and affairs of all toll bridges which thus had come under its jurisdiction, including the Carquinez, the Antioch, the San Mateo and the Dumbarton bridges. Subsequently, on October 4, 1937, in a separate proceeding, the commission ordered an independent investigation into the reasonable-ness of the tolls charged upon the Carquinez bridge alone. After hearings and on February 8, 1938, the commission rendered its opinion and order establishing the tolls for

automobiles at forty-five cents and five cents for each passenger in vehicles or on foot. The validity of this order is here called into question.

Notice is first taken of the contentions with respect to the scope of the review herein. In 1933 the legislature added the following paragraph to section 67 of the Public Utilities Act (Stats. 1933, p. 1157), referring to orders and decisions of the Railroad Commission: "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final." Otherwise the findings on questions of fact remained final.

The petitioner invokes section 1 of article IV and paragraph 1, section 10, article 1, of the United States Constitution. It contends that this court's independent judgment as to all probative facts in the record must be exercised in determining whether the constitutional sections have been violated, and that the exercise of such independent judgment will disclose the confiscatory nature of the tolls fixed by the commission.

This court has heretofore recognized that the enactment of the quoted provision in section 67 of the Public Utilities Act afforded an answer to the often repeated contention or criticism in the state and federal courts, with special refference to the case of Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, that legislation providing for regulation of public utilities should accord a complaining party an opportunity to obtain in a judicial tribunal an independent review of the law and the facts when the order or decision of the commission is challenged on federal constitutional grounds. (Southern California Edison Co. v. Railroad Commission, 6 Cal. [2d] 737, 744.) It was our conclusion in that ease that the "amendment did not, in any, substantial degree, change the rules in force prior thereto. The law of the state, both constitutional and statutory, before 1933 and as construed by this court, was at pains to preserve to the complaining party the right to challenge in this court any order or decision of the commission on federal constitutional grounds when, of course, such challenge

[fel. 169] could appropriately be made in the proceeding," and that an answer to such challenge included an independent consideration of both the law and the facts "even though the order of the court be a denial of an application for review". We there cited numerous cases wherein this court, prior to 1933, decided that neither the provision of section 67 which makes findings and conclusions of the commission on questions of fact final and not subject to review, nor the nature of the review proceeding, precluded an independent investigation into the facts when federal constitutional objections were available to the complaining party. regardless of whether the action of the commission was quasi-judicial, or legislative as in the fixing of rates. scope of the judicial review as bearing upon the question of the court's independent judgment in connection with the rate-making power within constitutional restraints was stated in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 50-54, as follows: .:

"The fixing of rates is a legislative act. In determining. the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly. or through the agency it creates or appoints to act for that purpose in Accordance with appropriate standards. court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. \* \* \* (Citing cases.)

. . . When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency, are met, as in according a fair hearing and acting upon evidence and not arbitrarily.

(Citing cases.) \* \* In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its

statutory authority.

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression. of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts. and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. \* \* But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already. had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the [fol. 170] sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation. judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that 'in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing'. (Darnell v. Edwards, 244 U. S. 564, 569.) The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. (Los Angeles Gas Corp. v. Railroad Commission, 289 U. S. 287, 305; Lindheimer v. Illinois Telephone Co., 292 U. S. 151, 169; Dayton Power & Light Co. v. Public Utilities Commission, 292 U. S. 200, 298.) It follows, in the application of this principle. that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such

findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne."

And from Los Angeles Gas Co. v. Railroad Commission. 289.U. S. 287, 304, we quote: "We do not sit as a board of revision, but to enforce constitutional rights. (San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446.) lative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the court may not interfere with the exercise of the state's authority unless confiscation is clearly established." The court there also referred to Minnesota Rate Cases, 230 U. S. 352, 452, quoting at page 307: " 'It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases.' ''

The first constitutional objection advanced by the petitioner is that the reduction of the prevailing rates is an impairment of the contract obligation between the county of Contra Costa and the petitioner. It bases its contention on the provisions of section 2845, subdivision 3, and section 2846 of the Political Code, and its claim that the provisions of those sections were a part of the contract between the grantor and grantee of the franchise. Subdivision 3 of section 2845, as it read at the time the franchise was granted, required that the board of supervisors granting authority to construct a toll bridge must at the same time, "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of construction or erection and maintenance of the bridge or ferry for the. first year, nor on the fair cash value together with repairs and maintenance thereof for any succeeding year." Sec-[fol. 171] tion 2846, enacted in 1872, reads: "The license tax

and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the Board of Supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry.

The petitioner construes the provisions of the foregoing sections, read together, as securing it against a reduction of the tolls during the specified period unless its net annual revenue exceeds fifteen per cent of the fair cash value. may fairly be assumed from the evidence that the income in any year, after all deductions, has not equalled the designated fifteen per cent. Merit in the petitioner's contention depends, however, on the propriety of reading into the language of the sections an intent on the part of the legislature to declare that receipts from tolls which return a net annual income of fifteen per cent "a not disproportionate" to the "fair cash value", and that it intended to encourage the investment of funds by guaranteeing such a return. This construction, however, fails to give full import to the language of the section which prohibits either an increase or a reduction in the tolls unless the receipts are shown to be disproportionate. The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with any intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much. Rather is it to be assumed that the legislature intended, not only to afford an adequate and proportionate return to the grantee, but that it also intended some measure of protection to the public's right to be charged not more than a reasonable toll for the use of the bridge. Toll bridges in this state have been subject to legislative control since 1854. (Newsom v. Board of Supervisors, 205 Cal. 262, 266.) 1872, when section 2846 was enacted by the legislature, sufficient scope was allowed between both interests, public and private, to permit adequate elasticity in the exercise of the legislative rate-making function in the light of prevailing economic conditions. Such a statute does not savor of a contract obligation to the grantee. Its object was to delegate to and vest in the designated body the power to regulate tolls as circumscribed by the stated limitation. The courts have recognized that this was, and that the creation of a contract obligation "as not, the purpose and object of such statutes. Of a statutory provision permitting participation in the rate-making function by two representatives on the board of commissioners of the Spring Valley Water Company selected at the time of incorporation (later changed by section 1, article XIV of the Constitution vesting the rate-making power in the board of supervisors), it was said: "These things are not of the contract; they appertain to the sovereignty of the state, and can not be bargained away," citing Munn v. Illinois, 94 U. S. 126.

The retention by the state of the power to regulate tolls was sustained where the statute involved provided for a legislative reservation to reduce the road tolls when it should appear that they produced an annual net dividend in excess of fourteen per cent, "so that it shall give that amount of net dividends per annum, and no more", and where by subsequent legislation rates which would produce [fol. 172] a return less than that were specified. (Covington and Lexington Turnpikė Co. v. Sandford, 164 U. S. 578). The court supported its conclusion by the application of the principles relating to tax immunity statutes, including the doctrine that "all doubts upon the question must be resolved in favor of the publie". It said: "The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be impated to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation." The court thereupon declared itto be the intention to pass to the new corporation, as successors of the original corporation, only the necessary powers, rights and capacities, and not any exemption from legitimate and ordinary legislative control. The same principle was later stated in the case of Railroad Commission v. Los

Angeles, 280 U.S. 145, 152, as follows: "The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the State to authorize the bargaining away of its · · · (Citing cases.) The principle is power to tax applicable in the present case to support the conclusion that the legislature did not create an immunity or exemption from the appropriate legislative control. Any such ambiguity is resolved in favor of the retention of the power to regulate. (Freeport Water Company v. Freeport City, 180 U. S. 587, 599; Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201.) In the last cited case a statute of 1862 prowided for water rates which should "not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested". A statute of 1885 changed the figure so that the net annual receipts should "be no less than six nor more than eighteen per cent" upon the value of the property actually used and useful to the business of furnishing water. The Supreme Court held that the statute of 1862 did not amount to a contract, and that the state had by section 31 of article IV (now article XII, sec. 1), of its Constitution reserved the power subsequently to alter the authority vested by the earlier statute. It said that "as the contract, if it existed, would take away from the legislature its otherwise undoubted right of regulation upon a subject of great public importance, there is still less reason for implying a contract which would prevent the state from using its power to that end in the future".

The foregoing discloses the inapplicability of certain decisions relied on by the petitioner, such as Detroit v. Detroit Cifizen's St. Ry. Co., 184 U. S. 368, wherein the court recognized the competency of a state legislature in the absence of constitutional prohibition, to authorize a municipal corporation to make a binding contract as to rates of fare with a street railway company, as distinguished from a mere delegation of authority to regulate. Such cases would not justify a conclusion in the present case that the provisions of the statute herein amount to an irrevocable contract for a minimum annual percentage of return to the petitioner. The power to contract, or the existence of a contract in such a case as distinguished from regulation must be so clear as [fol. 173] to be susceptible of no other construction. (Home Telephone Co. v. Los Angeles, 211 U. S. 265.) This dis-

poses of the petitioner's contention that the provisions of the statute with reference to tolls became a part of the franchise contract, or of any imputation that, as part of the contract, they are subject to any construction which includes a relinquishment of the power of regulation. By a parity of reasoning and pursuant to the foregoing cited decisions, the provisions of the statute may not be regarded as a contract that the rate-making power will always be vested in the board of supervisors. The reservation of the power to repeal or alter the law (Const. art. IV, sec. 31, now art. XII, sec. 1), has been held to enter into the contract with the corporation. (Stanislaus County v. San Jonquin C. & I. Co., supra, p. 211; Spring Valley Water Works v. Board of Supervisors, 61 Cal. 2, 5; Spring Valley Water Works v. Schottler, 110 U. S. 347.)

The petitioner urges that the Carquinez and Antioch bridges serve the same territory and must be considered as integral parts of a single transportation system; therefore, that the commission exceeded its jurisdiction in prosecuting an investigation into and making its order and decision referable to the Carquinez bridge alone. The petitioner concedes that the bridges are to some degree competitive, and says that a reduction in the tolls of the Carquinez bridge will compel a reduction to the same level in the tolls of the Antioch bridge, as well as a reduction below that level of the tolls on the ferry line, which like: wise is competitive. The fact that the bridges are competitive, together with a consideration of all the other relevant facts appearing, may be said to have justified the commission in concluding that they are not integrated into a single transportation system and that neither is used or useful in any service performed by the other. The Toll Bridge Company purchased and operated the competitive factors for the obvious purpose of reducing competition, and it has undoubtedly succeeded in accomplishing that end. It cannot expect more. In other words, it cannot hope, by purchasing nonmoney-making enterprises for the purpose of controlling competition, also to restrict the power of regulation in its own interests exclusively. The public interest as well as that of the corporation controlling the public toll highway must receive proper consideration. (Covington & Lexington Turnpike Road Co. v. Sandford, supra, 596-597.) There is no established precedent or authority presented by the petitioner which calls for

a declaration that under the facts of this case the Railroad, Commission was compelled to treat the two bridges as integrated units. On the contrary it has been held that less than the whole property owned by a public utility may be fixed as the appropriate unit for rate-making purposes. (Wabash Valley Elec. Co. v. Young, 287 U. S. 488; Gilchrist v. Interborough Rapid Transit Co., 279 U. 8./159.) The fact that the petitioner herein from the beginning of its operations kept but one set of books covering all transactions pertaining to both bridges does not conclude the matter in favor of its contention. The fact appeared in the Gilchrist case that the subway and elevated lines were treated in the accounts of the lessee of both lines as separate units. But that distinction would not justify the view that, had it appeared that they were treated as one unit, the conclusion would have been different. (See, also International Ry. Co. v. Prendergast, 1 Fed. Supp. 623, citing additional authorities at page 626.) The condition existing in this case, namely, that neither the Carquinez bridge nor the Antioch bridge is to any degree used or useful in the [fol. 174] public utility service and operation of the other, distinguishes it from the case of Coney v. Broad River Power Company, 171 S. C. 377, 172 S. E. 437, relied upon by the petitioner. There the decision was that the commission in computing a rate base for tolls to be charged by the power company for furnishing electric energy, could not exclude from consideration the properties of the street railway system owned and operated by it. But that conclusion specifically depended on the fact there appearing that the functions were related and that all the properties were used or useful in the company's business of generating electricity and in its related business.

To what extent the single ownership of such competing units subserves the public welfare and protects the co-relative rights and interests of the franchise holders and the public, is a question primarily for the commission to decide. Unless its decision has been unreasonable or arbitrary and may therefore be said to violate a constitutional right of the petitioner, the conclusion of the commission should not be disturbed. We find no departure from the recognized precepts upon which the petitioner may rely in the conclusion of the commission that the petitioner is not entitled to have the investment and operating expense of

both bridges included in the rate base upon which to compute a toll for Canquinez bridge.

The next contention for discussion is that the rate

ordered by the commission is confiscatory.

The opinion and order of the commission is dated February 8, 1938. It indicates that the commission was well aware of and considered the fact that the life of the franchise and the control of the properties will terminate in 1948 without compensation to the franchise holder, and that the operating properties must therefore be treated as a "wasting asset". It also appears that in fixing the tolls for the traffic over Carquinez bridge consideration was "given to the effect of such rates on the company as a whole".

The Toll Bridge Company was organized under the laws of Delaware in May, 1923, with a capital stock of \$5,000,-000, which was transferred to a holding company having a similar name. In 1925 it incurred a bonded debt of \$4,500,-000 of first mortgage seven per cent bonds and \$2,000,000 of second mortgage eight per cent bonds maturing in 1945. By the middle of 1935 it had reduced its capital stock to \$3,-719,593 plus \$57,280 subject to reissue for contingencies, and had reduced its bonded indebtedness to \$4,180,000. At that time it called in its outstanding bonds and effected a refunding thereof through an issue of \$4,300,000 first mortgage bonds at five and one-half per cent (including the expense of the call and reissue), the principal of which in turn was reduced to \$2,491,500 by October 31, 1937. commission found that the company's accounts showed that the actual investment in the Carquinez bridge structure, exclusive of lands, amounted to \$7,863,451, which, with land \$66,835, and furniture and fixtures, \$19,668, amounted to a total of \$7,949,954. The company's earnings have been sufficient to enable it to set up a reserve for depreciation of \$2,748,443 (accumulated on the six per cent, sinking fund method based on operating life under the franchise designed to return the investment upon the termination of that period), and additional reserves of \$1 .-055,313; and to accumulate a surplus which on October 31, 1937; amounted to \$419,123.

The testimony of the witnesses varied as to the estimated reasonable cost of the structure, and cost to re[fol. 175] produce new. The various estimates as sum-

marized in the findings and opinion of the commission are the following:

Book cost of bridge structure (Commission's	
witness Coleman)	\$7,863,451
Estimated reasonable cost of construction (Com-	
mission's witness Mitchell)	6,877,318
Cost to reproduce new (Commission's witness	
Mitchell)	6,340,844
Original cost (Company's witnesses Gerwick	
and Ready):	
• Bridge structure \$7,863,451	
Land 66,835	
Furniture and fixtures 19,668	7,949,954
Adjusted original cost (Gerwick and Ready)	8,332,622
Reasonable historical cost (Gerwick and Ready)	8,139,307
Reproduction cost new (Gerwick and Ready)	

After consideration of all the figures presented, the commission adopted the reported original cost, namely, \$7,949,-954, as the reasonable rate base. The estimated percentage of future annual net return was computed on the assumption that the reduction in the toll would be to a flat rate of fifty cents for each car including five passengers, and five cents for additional passengers, which was the rate charged on the San Francisco-Oakland bay bridge. The commission found that that rate, computed on the probable increase in traffic induced by the rate reduction, would produce annual net receipts amounting to approximately seven and onehalf per cent on the adopted base. It said: "A reduction in rates will stimulate the traffic over the bridge, although the extent, of course, cannot be estimated with exactitude. The results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure: When tested upon the bases usually followed by the commission such a rate of return is reasonable for this particular company, considering the unusual circumstances under which its properties were constructed and have been and are operated. However, for the time being, in order that the company may be assured of financial stability and to guard against possible inaccuracies in the estimate of induced traffic, by reason of rate reductions, a rate slightly higher than that proposed should be authorized." Thereupon the rate of 45 cents per car and five

cents for each passenger was designated by its order. The commission expressly reserved jurisdiction to "reopen this proceeding when experience has developed further data of traffic moving over the bridge under the proposed rates", and to adjust freight and other rates which were not to be deemed approved.

It appears in the record that the following percentages of net income had been earned by the company during the pre-

ceding eleven years:

		Per cent
Year	Capital	Return
1927	\$7,106,337	8.62
1928	7,365,297	6.82
1929	7,544,361	8.20
1930	7,777,981	9.50
:1931	7,946,753	8.18
1932	7,954,819	6.42
1933	7,950,995	5.86
1934	7,946,464	6.84
1935	7,946,068	7.42
1936	7,947,411	10.89
1937	7,947,537	12.12

These net rates of return, as well as the estimated future net percentage of return estimated by the commission, do not include and are not the source of the accumulated reserves for the repayment of the full investment by the end [fol. 176] of the franchise term. Those rates of return are in addition to the amounts set aside for the return of investment, and represent the investor's annual reward for the use of capital.

The petitioner urges that account should have been taken of the fact that prior to 1935 the company paid no stock dividends and that a rate should have been fixed which would enable the company to earn sufficient to return to the stockholders dividends undeclared and assertedly unearned in the past. But past deficits may not be included in the computation of the base for toll regulating purposes. "Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, any more than past profits can be used to sustain confiscatory rates for the future. (Board of Commissioners v. New York Telephone Co., 271 U. S. 23, 31, 32.)" (Los Angeles Gas Co. v. Rail-

road Comm., 289 U. S. 287, 313. See, also, International Ry. Co. v. Prendergast, 1 Fed. Supp. 623, 630.)

The petitioner does not dispute the reasonableness in adopting the reported original cost as a rate base, nor the correctness of the commission's finding as to the amount thereof except that it contends that two items estimated by it should have been included or added thereto, namely, an allowance for cost of developing the business, or going concern value; and an allowance representing additional cost of interest during construction. The petitioner states that the commission allowed the reported actual expenditure of \$688,092.56, and no more, as interest during construction: that capital funds in the sum of \$1.377,522 derived from . stock sales and advances by Rodeo-Vallejo Ferry Company, were expended for construction purposes prior to the time. when the bond money became available, and that the interest item should be increased to \$1,070,761. It is therefore contended that the sum of \$382,688 should be added to the adopted rate base as partial cost of money during construction, although at the same time it is conceded that the petitioner's accounts do not show the actual expenditure thereof.

The petitioner computes the going concern value at \$300,000, which it also contends should be added to the rate base figure of \$7,949,954. It arrives at that estimate by fixing nine per cent as the cost of money, and taking "for the first five years of operation the very low figure of the deficiency of the income of the Carquinez bridge below the 9% cost of money shown by the evidence, with interest, the result is the sum of approximately \$300,000.00" which represents "5% of the cost of reproducing new the physical property, before consideration is given to overheads and is most reasonable under any accepted standard".

The addition to the rate base of these claimed omitted allowances produces a total of \$8,632,622, which the company proffers as the correct rate base. The petitioner urges that the estimated future net income from Carquinez bridge traffic will return but 6.6 per cent to the stockholders, computed on the adjusted base, which, it argues, considering all the factors and elements which have made the risk adventurous, not to say hazardous, is so low as to be confiscatory. One of the elements relied upon is the alleged higher cost of money to the company, which it places be-

tween nine and ten per cent. It urges that the net annual return should be equal at least to that cost.

The items for going concern value and additional money cost during construction are not shown, nor claimed, to have been actually incurred or expended, but are hypothetical allowances, and perhaps adjustable for acceptance [fol. 177] and inclusion in estimates representing reproduction cost new. It is stated in the commission's opinion that "the book figure includes certain expenditures for organization purposes whose reasonableness might well be questioned". In adopting the rate base those expenditures were nevertheless permitted to remain. Under any method of computation which the commission might pursue based on the various estimates before it, it does not appear that it would have arrived at a higher figure, even including appropriately adjusted allowances for the hypothetical costs claimed by the petitioner. The petitioner has not shown any error or arbitrary action on the part of the commission in not adding to the base figure the two hypothetical costs. The commission has therefore allowed all that could be required of it in respect to those items. (cf. Wabash Valley Elec. Co. v. Young, 287 U. S. 488,500.)

In connection with the claimed item for going concern value, we should also note that there was not here encountered the complexity of starting a new utility whose service was the sale and distribution of a commodity, such as electrical energy, gas or water, which required the intricate balancing of innumerable costs in many departments in order to become established as a going concern. Compared to the services performed by such utilities the establishment of the operation of a toll bridge may be considered a fairly simplified task. The commission, was fully justified in concluding that there existed here no such impressive features influencing the intangible element of value known as going concern as were referred to or enumerated in cases relied upon by the petitioner (see McCardle v. Indianapolis Co., 272 U. S.: 400: Los Angeles Gas Co. v. Railroad Commission, 289 U. S. 287, 313; International Ry. Co. v. Prendergast, 1 Fed. Supp. 623, 629), and that that element of value was given complete recognition by adopting the conpany's own record of the actual cost thereof. The commission's finding on this item is fully supported by Dayton Power & Light Co. v. Public Utilities Commission of Ohio.

292 U. S. 290, wherein the court recognized that "going value is not something to be read into every balance sheet as a perfunctory addition. 'It calls for consideration of the history and circumstances of the particular enterprise' citing Los Angeles Gas and Elec. Corp. v. Railroad Commission of California, supra, at page 314. Continuing the court said: "Here the company was a small one and its organization simple. There was no diversified and complex business with ramifying subdivisions. We cannot in fairness say that after valuing the assets upon the basis of a plan in successful operation, there was left an element of going value to be added to the total. Even if the addition might have been made without departure from accepted principles, the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. 'It is necessarv again, in this relation to distinguish between the legislative and judicial functions.' (Los Angeles case, supra, p. 314.) Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not require them to do. For the legislative process. at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled."

Further sustaining authority is found in Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 292 U. S. 398, 411-413, wherein objection to a disallowance of a going concern value was rejected when it appeared that such [fol. 178] actual cost was nominal because of absence of competition and had actually been included as part of the

cost of operation.

The historical hazards and risks stressed by the petitioner were unquestionably taken into consideration by the commission and are reflected in the rate base adopted. The special "wasting asset" character of the physical properties was also duly considered, and in computing the net annual receipts, allowances were made for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period. Volume of traffic and consequently net returns have been increasing and tending steadily upward since 1933 and undoubtedly will continue to do so because of the increase in the traffic due to the operation of the bay bridge. It is therefore apparent that the commission has given due weight and consideration to all relevant facts and criteria in arriving

at a proper base upon which it estimated the probable future net return. Considering the company "as a whole", with all the particular elements and factors bearing upon the question, we conclude that the method adopted by the commission in arriving at the value of the property for rate regulatory purposes is not shown to have been unlawful. And taking into consideration all of the factors which influenced the decision of the commission, as disclosed by the record, it cannot be said that adequate return has not been afforded to the petitioner.

Nor are we persuaded that the petitioner is entitled as a matter of right to a percentage of net return equal to what it claims is the dost of money to it. The stated percentage of money cost might historically be considered correct, but it relates to a period antedating 1936 when the company's bonded indebtedness was refunded. Here again, however, the petitioner may not be sustained in its claim of right to recoup past losses or expenses in its financing experiences. A glance at the figures of the present bond issue, the principal of which includes the expenses incurred in calling in the original issue and in issuing the new bonds, sufficiently indicates that the percentage claimed is not the measure of today's needs.

If time and experience prove that the expectations of the commission based on the percentage of anticipated increase in traffic induced by the reduction in rates, as computed by witnesses, fall short of realization, the petitioner will still be protected by an adjustment to be effected by the commission in the exercise of its reserved jurisdictions

The petitioner claims that the commission erred in computing the net revenue upon which it estimated the percentage of return. The only claimed error in this computation is the allowance by the commission of income taxes on an accrual basis, rather than on the basis of actual expenditure in the base year. The contention is that the commission should have deducted income taxes, computed not on the income for the corresponding year, but on the income for the preceding year, on the theory that allowance should be made for the amount which is paid in the base year, rather than the amount accrued against the income of that year. We know of no practice or precedent in rate regulation which supports the theory of the petitioner and it has presented none. We perceive no error in the method of accounting which treats the income tax item on an accrual

basis for the purpose of arriving at net income for rate

regulatory purposes.

The petitioner finally urges that the commission's find-[fol. 179] ings, its conduct of the hearing, and the making of the order were not in accord with the principles of due process as reiterated and applied in the recent case of Morgan v. United States, 58 Sup. Ct. Rep. 773. In this connection it specifies that the separation of the properties of the Carquinez and Antioch bridges for rate regulatory purposes is against the "rudimentary requirements of fair play" and does not supply "those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature", mentioned in that case. The preceding discussion we think fully answers those contentions. Nothing appears which justifies a conclusion that all the essentials of a full and fair hearing before the Railroad Commission were not accorded the petitioner in compliance with the requirement's of the constitutional mandate. The findings of fact, while not given numerical segregation, are stated with sufficient fullness in the opinion of the commission to apprise the parties and this court of all the facts supporting the commission's decision. Opportunity to examine and object to proposed findings before the decision was rendered was not essential. The number and complexity of findings, a lack of opportunity to examine which in the Morgan case evoked criticism, were not here present. The petitioner made its objections in a petition for rehearing filed with the commission, which was denied.

The rest of the petitioner's specified particulars of omission or commission in the matter of the procedure and conduct of the hearing before the commission relate to the procedure of defining the issues upon which evidence was received. It is not contended that the petitioner was not fairly informed of what the issues were to be or that the issues were not party defined and understood by all parties concerned during the course of the hearing. As stated in the still more recent case of National Labor Relations Board v. Mackay Radio and Telegraph Company, 58 Sup. Ct. Rep. 904, at 913, "as no other detriment or disadvantage is claimed to have ensued from the board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288".

On its denial of a petition for rehearing in Morgan v. United States, 58 Sup. Ct. Rep. 773, 58 Sup. Ct. Rep. 999, the Supreme Court again adverted to the distinction thus made in the Mackay Radio case. We conclude that the procedure followed in the present matter has not infringed upon the rights of the petitioner vouchsafed to it by the state and federal Constitutions.

The ora of the commission is affirmed. The order of this court creeting a stay pending determination in this proceeding is discharged.

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IN SUPREME COURT OF CALIFORNIA

[Title omitted]

Petition for Rehearing-Filed October 17, 1938

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# [fol. 188] IN SUPREME COURT OF CALIFORNIA

#### [Title omitted]

#### PETITION FOR REHEARING

To the Honorable, William H. Waste, Chief Justice, and the Associate Justices of the Supreme Court of the State of California:

· The petitioner, American Toll Bridge Company, respectfully petitions this Honorable Court to grant a rehearing in

the above entitled proceeding.

The reduction which the Railroad Commission made in the tolls of the Carquinez Bridge will have the effect of [fol. 189] reducing the gross revenue of the Bridge from \$1,552,934.00 in 1937 to only \$1,143,520,00 in 1938. The amount of the reduction is \$409,414.00 per year which is a cut of 26.4 per cent.

When it comes to the net revenue, as distinguished from the gross revenue, the situation will be even more serious. This is for the reason that it will be necessary to keep the bridge going and that it will be impossible to make a reduction in the expenses of operation and maintenance commensurate with the reduction in the gross revenue. The reduction in the net revenue will be from \$963,\$16.00 in 1937 to \$570,298.00 in 1936. This is a reduction of \$393,518.00 per year, which is a cut of 40.8 per cent.

This drastic reduction was made in a case in which the Railroad Commission proceeded in entire disregard of the rights which petitioner claims under its contract with the

County of Contra Costa.

This reduction was, furthermore, made in a proceeding initiated by the Railroad Commission itself, by a mere notice of investigation, without the framing of issues and in disregard of the due process of law claimed by petitioner under the Constitution of the United States as interpreted and applied by the Supreme Court of the United States in Morgan v. United States, 304 U. S. 1, and other cases.

It is respectfully submitted that this court, in deciding this case, has entirely overlooked or has misapprehended important points relied on by petitioner, as well as made numerous errors in statements of fact and conclusions, and [fol. 190] that the interests of justice require that a rehearing be granted so that said matters may be corrected. We shall group the reasons in support of our petition under the following three general heads:

I. Impairment of Contract Obligations:

II. Confiscation; and

III. Procedure before Railroad Commission—Denial of Due Process of Law.

Our references to the court's Decision will be to the printed copy published in Vol. 96, No. 4724, of "California Decisions", pages 367-381.

Emphasis in this petition is ours, unless otherwise speci-

fied.

I

## Impairment of Contract Obligations

1. The court gave to the language of Sections 2845 and 2846 of the Political Code, as incorporated in the contract between the County of Contra Costa and petitioner; a curious and entirely unwarranted construction.

The relevant portions of Section 2845 of the Political Code, as the same read at the time when the County of Contra Costa enacted Ordinance No. 171, providing for the construction and operation of the Carquinez Bridge, were as follows:

[fol. 191] "The board of supervisors granting authority to construct a toll-bridge or to keep a public ferry; must at the same time:

- "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.
- "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year:

Section 2846 of the Political Code has at all times, in and after 1872, nead as follows:

"The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

That said two sections entered into the contract evidenced by said Ordinance No. 171 and formed a part of it, follows necessarily from the authorities and is here conceded.

Kennedy v. City of Gustine, 210 Cal. 18, 21;

Flagg v. Sloane, 135 Cal. App. 334, 336;

Frank v., Crescent Wharf & Warehouse Co., 50 Cal. App. 272, 275;

City of Cincinnati v. Public Utilities Commission of . Ohio, 98 Ohio St. 320, 3 A. L. R. 705, 708;

6 Cal. Jur. 310.

That said two sections must be read together is equally [fol. 192] clear. In fact, the first sentence of Section 2846 says "as provided in the preceding section" and thus expressly ties the two sections together.

Reading the two sections together, the following situation appears:

- (1) Section 2843 refers to the "amount of license tax" and also to the "rate of tolls" to be fixed by the board of supervisors at the time of the enactment of the ordinance granting the franchise and to remain effective until thereafter changed. The section also provides that the income shall, for the first year, be computed on the "cost of construction or erection" of the bridge and in succeeding years on the "fair cash value" thereof.
- (2) Section 2846 refers to the "license tax" and the "rate of toll" effective in subsequent years, during the term of 20 years.

Under the specific provisions of Section 2846, the grantees of toll bridge franchises have the right not to have the tolls diminished during the term of 20 years.

"unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

In Section 2845, the Legislature itself has declared what [fol. 193] it meant by the word "disproportionate" as used in the next section.

Construing Sections 2845 and 2846 together, it is clear that what the Legislature had in mind was that tolls which yield up to 15% on the cost of construction or erection of the bridge or the fair cash value thereof, together with the necessary repairs and maintenance, are not to be regarded as "disproportionate" but that if and when the yield becomes more than 15% it will be deemed to be "disproportionate". In the latter event, even though this situation should develop within less than 20 years after the effective date of the franchise, the board of supervisors would have the right, under the contract, to reduce the tolls in the manner specified in the appropriate sections of the Political Code.

These contract provisions do not mean that American Toll Bridge Company is at this time necessarily entitled to a 15% return. They do mean, however, that the Company has a contract right to have the tolls specified by the board of supervisors of Contra Costa County in the ordinances granting the franchises not diminished by any public authority unless it should appear that the yield from such tolls has become in excess of 15%.

The Railroad Commission's brief concedes (p. 4) and this court found (Decision, p. 373) that the yield has never ap-

proached as much as 15 per cent.

In its brief herein, the Railroad Commission, while differing from petitioner as to the legal effect of the language, [fol. 194] nevertheless agreed with petitioner as to the meaning of the language of said Sections 2845 and 2846, as follows (Brief, p. 55):

"It may be conceded that the intent of section 2845(3), when read together with section 2846, and in the light of the earlier statutes, is that the boards of supervisors should not at any time during the life of the franchise so reduce the tolls as to fail to yield the grantee a return of 15.

per cent on the cost of construction or on some other valuation of the property exclusive of the franchise itself."

Turning now to the Decision herein, the court finds that the language of said Sections 2845 and 2846 does not give jutitioner the contract rights on which petitioner has heretofore always relied. Referring to petitioner's construction of said language, the court said (Decision, p. 373):

"This construction, however, fails to give full import to the language of the section (Section 2846) which prohibits either an increase or a reduction in the tolls unless the receipts are shown to be disproportionate."

Continuing, the court'said:

"The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with any intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much."

As we read the Decision, the above analysis and reasoning are the foundation on which the court erected the conclusion that the language on which petitioner relies is not the language of contract.

We now draw the court's attention specifically to the fact [fol. 195] that the above analysis and reasoning and the conclusion based thereon are fatally defective for the reason that the court has failed to give proper effect to the distinction between license tax and the rate of toll and has, accordingly, entirely misconstrued the language of the first sentence of said Section 2846.

Section 2845(2) refers to the amount of the license tax. The court made no reference to that paragraph and its failure to do so may perhaps account in part for its misconstruction of the first sentence of Section 2846.

Section 2845(3) refers to the rate of tolls. We thus have two separate paragraphs of Section 2845 referring separately to these two different items—the license tax and the tolls.

Then comes Section 2846, the first sentence reading as follows:

"The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished dur-

ing the term of twenty years, at any time, unless it be shown to the satisfaction of the board of supervisors that the receipts from tolls in any year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

Without noticing the distinction between the license tax and the rate of toll, the court erroneously holds that the words "increased" and "diminished" each applies to both the license tax and the rate of toll and on that erroneous foundation reaches the conclusion that we have here a flexible system of ups and downs in the rate, which can spell [fol. 196] only a system of flexible regulation by public authority as distinguished from fixed contract rights.

The court's error apparently arose from the failure to observe that the words must be construed distributively, the words "license tax" and "increased" going together and the words "rate of toll" and "diminished" going together.

If the court's construction that the words "increased" and "diminished" both apply to "rate of tolls" and also to "license tax" is correct, then note the following results:

- (1) It would follow that the license tax cannot be diminished unless the yield becomes disproportionate (i. e., in excess of 15 per cent): but that is the very time when, by reason of more moneys in the treasury, the toll bridge company could pay a higher license tax.
- (i. e., in excess of 15 per cent): but that is the very time when, by reason of higher earnings, the rate of toll should be diminished, not increased.

The Legislature, of course, could not have intended any such results.

It seems very clear to us that the proper construction must be as follows:

(1) The license tax must not be increased unless the yield [fol. 197] becomes in excess of 15 per cent. In such event, the company has more money and can pay a higher license tax. But, in order to prevent excessive license taxes at such times, the last sentence of Section 2846, which is also overlooked in the court's Decision, provides:

"The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

(2) The rate of toll must not be diminished unless the yield becomes in excess of 15 per cent. In that event, fairness to the public requires that the tolls be reduced so that the yield shall not be in excess of 15 per cent, that being the standard of reasonableness established by the Legislature.

Section 2846 does not provide for any increase in the rate of tolls after they are first written into the ordinance granting the franchise. The investor must be assumed to enter upon the project with his eyes open. If the rate of tolls written into the ordinance at the time of its adoption by the board of supervisors will not, in the opinion of the proposed toll bridge owner, yield a satisfactory return, he simply declines to accept the franchise; but if he accepts the franchise and constructs the bridge, he must take the consequences if the tolls fail to yield the expected revenue.

On the other hand, if the toll bridge owner can be forced to operate on a low return, if he has misjudged, his ability [fol. 198] to earn a fair return, on the tolls as fixed, the common dictates of fair play require (and the statute, as we believe it must be interpreted, provides) that he has a contract right not to be deprived of a reasonable return under the standard written into the contract by the Legislature, if the volume of the traffic should confirm his original expectations.

The authorization of such a contract by the Legislature is entirely consistent with the proper demands of public policy. An intending toll bridge constructor has a measure of protection in the event the project is successful and the public has the assurance that the tolls will be reduced in the event the yield becomes greater than that specified under the standard of reasonableness of tolls established by the Legislature.

Under such a policy, a tremendously hazardous and difficult project such as the Carquinez Bridge can be constructed.

Without the contract rights which they thought they were securing, no investors of ordinary common sense would ever have risked their money in such an enterprise. The Carquinez Bridge, the pioneer of all the San Francisco Bay Bridges, would never have been built.

We believe that the error of the court's construction of [fol. 199] Section 2846 is so clear that further comment would be unwarranted. And with that erroneous construction falls also the court's conclusion erected thereon, to the effect that the language of Sections 2845 and 2846 of the Political Code, when read into the contract between the County of Contra Costa and the petitioner, is not the language of contract.

2. The court entirely overlooked the legislative history of toll bridge construction in California, as found in the General Laws and Special Acts prior to 1872, showing a clear intention on the part of the Legislature that Sections 2845 and 2846 of the Political Code should grant contract rights to grantees of toll bridge franchises.

At pages 13 to 27 of our closing brief, we narrated what was, to our mind, a very interesting story of the development of public regulation, of the construction and operation of toll bridges in California from the early '50's to the time of the enactment of Sections 2845 and 2846 of the Political Code in 1872.

The court's Decision in no way refers to the matter.

As we pointed out, the toll bridge franchises granted either by the Legislature itself or by boards of supervisors at first merely provided that the toll bridge owners should be permitted to charge such tolls as the court of sessions and later the boards of supervisors should fix annually (Closing [fol. 200] Brief, pp. 13-15).

The second stage in the evolution of toll bridge regulation consisted of a series of Special Acts enacted in 1857 and a number of subsequent years, principally 1861-4. These Acts specified that the operators could charge such rates of toll as the boards of supervisors might fix annually 'provided, that the Legislature may at all times, modify or change the rates as fixed' (Closing Brief, p. 15).

Ender both types of acts the matter of rate regulation was in the hands of the courts of sessions and then of the boards of supervisors, unrestricted by any statutory limitation as to rate of return. The grantees of the toll bridge franchises had no contract protection against action by boards of supervisors reducing their rates.

Because of this situation, there came the third stage in the evolution of toll bridge regulation. Beginning with 1862 and extending to 1872, General Laws and Special Acts provided, substantially, that the operators of the toll bridges could charge such rates as the boards of supervisors should annually prescribe but there followed a provision of the general tenor that the board of supervisors should not fix the rates of toll so low as to make the net income less than a specified percentage per annum upon the cost or fair value or some similar specified base figure, of the toll bridge property. In our closing brief, we quoted the exact language of these various statutes (Glosing Brief, pp. 17-23).

At this third and last stage prior to 1872, the Legislature [fol. 201] clearly entered the realm of contract and provided that the toll bridge operators thereafter receiving franchises should be protected by contract provisions against reduction of tolls so as to yield less than a specified rate of

return.

This was the situation when the Legislature, in 1872, enacted Sections 2845 and 2846 of the Political Code. What the Legislature then did was clearly to continue in effect the policy which had been evolved as the result of 20 years of experience in the granting of toll bridge franchises and to provide that, although the boards of supervisors could pass upon the tolls each year, they should be subject to the very definite limitation—a contract right in the grantees—that they could not reduce the tolls so low as to yield less than the specified return.

Sections 2845 and 2846 of the Political Code are merely a recognition of the evolution of toll bridge franchise regulation from the earlier unlimited right of boards of supervisors to fix such tolls as they might please, to the later limitation of such right by appropriate contract protection ac-

corded to the grantees of the franchises.

We respectfully submit that if the court had given consideration to the legislative history of toll bridge construction and operation up to the enactment of Sections 2845 and 2846 of the Political Code in 1872, the court would have concluded that said legislative history supports and gives emphasis to petitioner's construction of said Sections 2845 and 2846 and to petitioner's claim that the Legislature in
[fol. 202] tended, by the enactment of said Sections, to give toll bridge operators the contract protection which petitioner claims.

3. The court failed to follow the agreement between the Railroad Commission and petitioner as to the meaning of

the language of Sections 2845 and 2846 of the Political Code and adopted a construction for which neither party contended.

As we have already pointed out, the Railroad Commission in its brief (p. 55) agreed with petitioner as to the proper meaning of the language of Section 2845, where read together with Section 2846 of the Political Code. There was agreement that the language means that the boards of supervisors should not at any time during the life of the franchise so reduce the tolls then in effect as to fail to yield the grantee a return of less than 15 per cent on the specified rate base. Said Sections do not give the boards of supervisors any authority to increase the tolls above those at any time in effect.

· Neither the Railroad Commission or petitioner construed said Sections as giving the boards of supervisors any authority to reduce the license taxes nor to increase the rates of toll.

The court's Decision adopted a construction which neither party to the litigation urged as correct.

We urge the desirability of having the court, on rehearing, [fol. 205] give further consideration to this issue.

4. The court failed to give petitioner the benefit of the contract which it found to exist and to the burdens of which it held petitioner to be liable in County of Contra Costa v. American. Toll Bridge Company, 10 Cal. (2d) 359. The court · did not even cite said decision.

In County of Contra Costa v. American Toll Bridge Company, 10 Cak (2d) 359, decided as recently as December 11, 1937, this court gave consideration to the very ordinance here at issue, namely, Ordinance No. 171 of the Board of Supervisors of Contra Costa County, granting the franchise for the construction and operation of the Carquinez Bridge.

The court there found that said Ordinance and its acceptance constituted a contract between the County of Contra Costa and this petitioner and that this petitioner was bound by the burdens of that contract, specifically its provision for the annual payment to the adjacent counties of two per cent of the gross tolls collected from the operation of the Carquinez Bridge.

In its present Decision, the court did not even mention .

its decision in the County of Contra Costa case.

We submit, very respectfully, that it is not just to hold petitioner to be bound by the hurdens of its contract and yet to deny to petitioner the benefits of the same contract.

We earnestly request that this matter, which was in no-[fol. 204] way referred to by the court in its Decision, be

given serious consideration on rehearing.

5. The cases cited by the court in support of its conclusion refer to entirely different situations and are not in point.

In Spring Valley Water Works v. Schottle, 110 U. S. 347, and Stanislaus County v. San Joaquin and King's River Canal and Irrigation Company, 192 U. S. 201, the question was simply whether the people of the State of California had reserved power to enact legislation which would have the effect of amending a statutory provision which was part of the charter of a California corporation.

Section 31 of Article IV of the Constitution of California,

adopted in 1849, read as follows:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

In view of this specific provision of the Constitution of California referring to the laws under which California corporations were formed, the Supreme Court of the United States, of course, held in both of said cases that the provisions of the statutes under which the California corporations had been incorporated could be amended or repealed (Closing Brief, pp. 29-36).

In the present case, there is no issue whatever with reference to the amendment or repeal of any provision of the articles of incorporation of American Toll Bridge Company [fol. 205] or of the statutes under which that corporation was incorporated. The statutory provisions here under consideration are Sections 2845 and 2846 of the Political Code, which provisions have nothing to do with a corporation's articles of incorporation and are equally applicable whether the grantee of a toll bridge franchise is a corporation, a partnership or an individual. These provisions have nothing whatever to do with the powers of California corporations.

Railroad Commission of California v. Los Angeles Railway Corporation, 280 U. S. 145, cited in the Decision herein (p. 374), is one of the cases relied upon by petitioner. While, in that case, the Supreme Court of the United States found that, on the facts of that case, the State of California had not delegated to the City of Los Angeles the authority to contract as to street railway fares, the court, at page 154, stated very clearly the principle which the petitioner believes to be the law, as follows:

"It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. Detroit v. Detroit Citizens' R. Co., 184 U. S. 368, 382. Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508, 515. Public Service Co. v. St. Cloud. 265 U. S. 352, 355. And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. Detroit v. Detroit Citizens' R. Co., supra, 389. And, in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates · however inadequate they may prove to be. Public Service Co. v. St. Cloud, supra."

[fol. 206] While the court, in Home Telephone and Telegraph Company v. City of Los Angeles, 211 U. S. 265, found that on the facts of that case the Legislature had not conferred upon the City of Los Angeles the power to contract with reference to telephone rates, the court, at page 273, states the rule as follows:

"It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 382; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508."

The question at issue in the Home Telephone and other cases cited in the court's Decision herein was whether the Legislature had delegated to a political subdivision the right to contract with designated classes of public utilities with reference to the rate of fare or toll. In the case now before this court, said question is not involved, for the reason that the provisions here under consideration (Sections 2845 and 2846 of the Political Code) were written into the contract not by a subordinate political agency but by the Legislature itself. No question arises here with reference to the authority of a political subdivision. We do not believe that anyone will challenge the right of the Legislature itself to enact the provisions here under consideration and to make them a part of a franchise contract.

In Covington and Lexington Turnpike Road Company v. [fol. 207] Sanford, 164 U. S. 578, the governing facts were quite different from those which are set forth in this court's reference to that decision (Decision, pp. 373-4).

It appeared that Covington and Lexington Turnpike Read Company was incorporated by an Act of the Legislature of Kentucky approved on February 22, 1834, with authority to construct and permanently maintain a turnpike road from Covington to Lexington, Kentucky. By the nineteenth section of the statute, the company was authorized to collect certain specified tolls. Section twenty-six provided as follows:

That if at the expiration of five years after said road has been completed, it shall appear that the annual net dividends for the two years next preceding the said company, upon the capital stock expended on said road and its repairs, shall have exceeded the average of fourteen per cent per annum thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll, so that it shall give that amount of net dividends per annum, and no more."

The Turnpike Company contended and the Supreme Court agreed that said section twenty-six was part of the defendant's contract with the State and that it granted to the Turnpike Company a contract right to the earning therein specified (pp. 581, 586).

The questions before the Supreme Court in that case arose out of the subsequent statutes by which two new turn-

pike corporations were later incorporated and the turnpike company to whom the above rights had been granted in 1834 passed out of existence. The question at issue was simply whether or not the above contract rights had passed over [fol. 208] to the two new corporations. The court found that the situation as to the two new corporations was entirely different from the situation as to the original corporation and that the Legislature had not provided that the two new corporations should have contract rights similar to those of the original corporation.

At page 586, the court states the question at issue as follows:

"Was the Covington and Lexington Turnpike Road Company entitled, under its charter, to be exempt from legislation that would prevent it from earning at least fourteen per cent 'upon the capital stock expended upon said road and its repairs', as prescribed in the act of 1834?"

Referring to this question, the court said (p. 586):

The act of 1834 having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851, and which, by the terms of that act, succeeded 'to all the powers, rights and capacities' granted by the act of 1834 to the original corporation."

The Supreme Court of the United States here found very definitely that the Act of 1834 gave to the original turnpike corporation an exemption or immunity from legislation which would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs. Basing its decision on that assumption, the court then went on to consider the entirely different question as to whether or not the Legislature had granted these contract rights to the two new turnpike companies. This question the court answered in the negative.

[fol. 209]. The entire decision proceeds on the assumption that section twenty-six of the Act of 1834 formed part of the contract between the Turnpike Company and the State and that the Turnpike Company's rights under said con-

tract were entirely valid. Under said decision, there is no question that said contract rights would have continued in full force and effect had it not been for the entire change in circumstances, under which two new turnpike companies were created and the old company went out of existence without any action by the Legislature clearly conferring on the two new turnpike companies the contract rights which had been originally conferred upon the first turnpike company.

Hence, the Covington case, instead of being authority to support the court's Decision in the present case, has the

very opposite effect.

6. The court erroneously failed to give effect to the decisions of the Supreme Court of the United States and other courts which sustain the authority of the Legislature to grant or authorize the granting of contract rights such as those here under consideration.

While it is, of course, true that the surrender by contract of a power of government will be closely scrutinized (Home Telephone and Telegraph Company v. City of Los Angeles, 211 U. S. 265, 273), it is also true that the reports of the decisions of the Supreme Court of the [fol. 210] United States and other courts are full of cases in which the court recognized the authority of the Legislature to make or to authorize the making of contracts containing definite public utility rates or fares which could not be changed by public authority during a specified reasonable time, or only if the yield should become greater than the one specified in the contract, and found that on the facts of the case such contract had been lawfully entered into.

Among these-cases are the following decisions of Federal courts:

Los Angeles v. Los Angeles City Water Company, 177 U. S. 558;

Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 382, 384, 386;

City of Cleveland v. Cleveland City Railway Company, 194 U. S. 517;

Vicksburg v. Vicksburg Waterworks Company, 206 U. S. 496, 508;

City of Minneapolis v. Minneapolis Street Railway Company, 215 U. S. 417;

Detroit United Railway v. State of Michigan, 242

U. S. 238;

Columbus Railway, Power & Light Company v. City of Columbus, 249 U. S. 399;

St. Cloud Public Service Company v. City of St.

Cloud, 265 U.S. 352;

Omaha Water Co. v. City of Omaha, 147 Fed. 1;

Columbus Railway, Power & Light Co. v. City of Columbus, 253 Fed. 499;

Hillsdale Gaslight Co. v. City of Hillsdale, 258

Fed. 485;

[fol. 211] Nebraska Gas & Electric Co. v. City of Stromsburg, 2 Fed. (2d) 518;

Cincinnati N. & C. Ry. Co. v. City of Cincinnati, 71 Fed. (2d) 124.

These are principally cases in which the question at issue was whether or not the Legislature could confer on a subordinate political subdivision authority to enter into a binding contract as to public utility rates for a reasonable period of time.

As already pointed out, the case now before this court is even simpler for the reason that there is not involved here any question of delegation by the Legislature to a subordinate political agency of the right to enter into a contract as to rates or tolls. Here the Legislature itself enacted the contract provisions.

We do not find in the court's Decision herein any reference to the above distinction nor anything to show that the court realized that this is a case in which there can be no question of the authority of the Legislature to act.

On the other hand, as we have hereinbefore pointed out, the Supreme Court of the United States in the Covington case (164 U. S. 578) assumed, as the foundation for its decision, that a statute enacted by the Legislature itself and providing for a yield up to fourteen per cent per annum conferred upon the Turnpike Company a contract right to receive such yield.

We respectfully suggest that it would be proper, on rehearing, to make a re-examination of the decisions of the [fol. 212] Supreme Court of the United States, bearing in mind the fact that in the present case the provisions on which petitioner relies are not the act of some subordinate political agency but the act of the Legislature itself.

7. The court entirely overlooked petitioner's concluding point under this head that, even assuming for the sake of the argument that the language of Sections 2845 and 2846 of the Political Code is the language of regulation and not that of contract, nevertheless the Legislature of 1937 did not in fact repeal or amend Sections 2845 and 2846 of the Political Code and that the Railroad Commission, stepping into the shoes of the Board of Supervisors of Contra Costa County, is still obligated to follow as to toll bridge companies the standard of reasonableness of rates established by said Sections 2845 and 2846 of the Political Code.

The point thus overlooked by the court is crucial and would, if decided in favor of petitioner, determine the entire case in its favor.

The question is not what the Legislature might have done in 1937 in the exercise of its power of regulation, but what

it actually did do in 1937.

The point is fully presented in petitioner's closing brief, pages 80-88, to which the court is respectfully referred. [fol. 213] As we there pointed out, the Legislature, by the Act of July 1, 1937, under which the Railroad Commissions claims, conferred on the Commission no authority to interfere with the standard of reasonableness of tolls contained in Sections 2845 and 2846 of the Political Code and the Railroad Commission, in stepping into the shoes of the Board of Supervisors of Contra Costa County, is bound by said standard of reasonableness.

We believe that a rehearing should be granted in order to enable the court to pass upon this important point, which

· is entirely overlooked in the Decision herein.

### II

### Confiscation

8. The court erred in holding that the Railroad Commission made the necessary findings of fact.

It is elemental that it is the duty of an administrative tribunal such as the Railroad Commission to set forth "the basic and essential findings required to support the Commissioner's order". In Florida v. United States, 282 U. S. 194, the order under consideration was an order of the Interstate Commerce Commission dealing with rates on logs moving by railroad between points within the State of Florida. The Commission had made a general finding that the intrastate rates theretofore in effect resulted in "unjust discrimination [fol. 214] against interstate commerce", but no findings were made upon the basic and essential facts underlying this ultimate fact. In setting aside the Commission's order because of the failure to make proper findings, the Supreme Court, in a decision by Chief Justice Hughes, said (p. 215):

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (The Beaumont, Sour Lake & Western Railway Company v. United States, 282 U. S. 74) but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make the findings for the Commission but to ascertain whether its findings are properly supported."

Again, in the very recent case of Saginaw Broadcasting Co. v. Federal Communications Commission, 96 Fed. (2d) 554, decided on March 16, 1938 by the United States Court of Appeals for the District of Columbia, the court said (p. 559):

"The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided according to the evidence and the law or, on the contrary, according to arbitrary or extra-

legal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts states as its basis, also [fol. 215] whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

Continuing, the court said (p. 560):

"Our conclusions on this topic are, we think, confirmed by the decisions of the Supreme Court which consider what findings of fact are necessary in reports of the Interstate Commerce Commission." Section 14 of the Interstate Commerce Act, 34 Stat. 589, 49 U. S. C. §14 (1934), requires only that the report of the Commission shall state its conclusions, unless damages are to be awarded. Nevertheless, the Supreme Court has laid down the rule that, although under this section formal findings of fact are not required, substantial findings of the basic and essential facts necessary to support the order must appear."

To the same effect, see also the following cases cited by the United States Court of Appeals:

United States v. Baltimore & Ohio R. R., 293 U. S. 454, 465 (Chief Justice Hughes):

United States v. Chicago, M. & St. P. & P. R. R. Co., 294 U. S. 499, 510-11 (Justice Cardozo);

Kewanee & G. Ry. Co. v. Illinois Commerce Commission, 340 Ill. 266, 268-70; 172 N. E. 706, 708.

In its Decision herein, the court said (p. 381):

"The findings of fact, while not given numerical segregation, are stated in sufficient fullness in the opinion of the commission to apprise the parties and this court of all the facts supporting the commission's decision."

We submit that the court, in making this statement, fell into grievous error.

[fol. 216] The Commission's decision fails to make any of the following "basic or essential findings required to support the Commission's order" in a case involving the fixing of rates or tolls:

- 1. There is no finding as to the fair value of the property or the fair rate base;
- 2. While the order purports to establish a rate for 1938, there is no finding as to what revenue the rate established by the Commission will produce in 1938 or in any subsequent year;
- 3. There is no finding as to the reasonable amount of maintenance and operating expenses and taxes to be paid in 1938 or in any subsequent year;
- 4. There is no finding as to a reasonable and proper allowance for depreciation or amortization in 1938 or in any subsequent year;
- 5. There is no finding as to how many dollars will remain in 1938 or in any subsequent year for return on the fair value of the property;
- 6. There is nothing whatever in the decision to show that the rates established by the Commission will yield even a return of 7.5 per cent on the fair value of the property. The entire matter is left to speculation and conjecture and this court is called upon by the Commission to do the fact-finding work which it was the Commission's duty to do.
- [fol. 217] The court, in its Decision, does not even attempt to point out the Commission's finding as to a single one of the above "basic or essential findings" except only that the court makes the following unsupported statement on the subject of the rate base (p. 377):
- "After consideration of all the figures presented, the commission adopted the reported original cost, namely, \$7,949,954, as the reasonable rate base."

There is nothing in the Commission's opinion to justify that statement. The Commission Joes not once even mention such a thing as a "rate base" and at no point does it make a finding that \$7,949,954 or any other sum is a reasonable rate base.

In fact, the Commission's brief herein makes the following statement, which is directly contrary to the court's above statement (Brief, p. 91):

"The Commission in its opinion did not make an exact finding of value."

Said figure of \$7,949,954 is merely a figure used by the attorneys for the Commission in their brief and does not represent any finding of fact made by the Commission.

There is not even a pretext that the Commission made any finding of fact as to any one of the other "basic or essential findings" hereinabove listed and required to support

the Commission's decision.

We submit that because of the Commission's failure to make the basic and essential findings of fact required to support its order and decision, a rehearing should be [fol. 218] granted and the Commission's order thereupon set aside.

- 9. Considering the Carquinez Bridge alone, the court erred in holding that the rates fixed by the Railroad Commission will not confiscate petitioner's property in that bridge.
- a. Wasting Asset. The Court, while conceding that this is a case of a "wasting asset", erred in failing to carry to their logical conclusion the principles applicable to such a situation.

At page 376 of its Decision, this court said:

"The opinion and order of the commission is dated February 8, 1938. It indicates that the commission was well aware of and considered the fact that the life of the franchise and the control of the properties will terminate in 1948 without compensation to the franchise holder, and that the operating properties must therefore be treated as a 'wasting asset'."

This is the first case of a public utility "wasting asset" to come before this court.

The witnesses for the Railroad Commission and the petitioner agreed as to the definition and the characteristics of such "wasting asset".

Mr. Coleman, one of the Commission's financial experts, testified as follows (Tr. 303-4):

"Q. (by Mr. Thelen): Now when Mr. Rowell asked you that question, referring to a wasting asset, please state

whether you understood that term, as applied to the facts [fol. 219] in this case, to mean that the investment from the beginning is to be treated as a wasting asset and is to be returned with fair interest or dividends by the time the franchise expires?

"A. (by Mr. Coleman): I think that is correct. I have considered that here was an asset whose value would cease

on a certain known date.

"Q. And by that date, of course, it would be necessary to have the investment returned?

"A. That is cight.

"Q. And in the meantime, those who made the investment would naturally expect to receive reasonable interest, if it were bonds, and reasonable dividends if it were stock?

"A. I presume that would be the reason they would make

the investment."

Mr. J. W. Haines, a partner in Haskins & Sells, a witness called by petitioner, testified that

"the logical application of that theory (i. e., wasting asset theory) requires the return of the investment during the life of the asset, plus a fair interest and/or dividend on that portion of the investment which, from time to time, has not as yet been returned." (Tr. 670.)

Attached to the Petition for Rehearing before the Railroad Commission, as Exhibit A, is a statement entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948—Under Rates as per C. R. C. Decision". This exhibit shows whether or not the rate fixed in the Commission's decision will enable petitioner to meet the requirements of its "wasting asset".

The Commission's subsequent brief does not in any way challenge the accuracy of the figures shown in said exhibit and they must be accepted on the record in this case to be,

as they actually are, correct.

[fol. 220] The exhibit shows that at the end of the franchise period in 1948, the revenues from the rates now fixed by the Commission will have failed to retire 437,167 shares of stock of the par value of \$1.00 per share.

The exhibit further shows that said revenues will have failed to apply as much as a single dollar on the \$2,404,600.00 of dividends at 8% which the Company failed to earn and

declare during the period from May 21, 1927 to December 31, 1935. Said figure of \$2,404,600.00 includes nothing whatever for interest.

Finally, the exhibit shows unretired capital stock at \$1.00 per share plus unpaid dividends, at the end of the franchise

period, totalling \$2,841,767.00.

It thus appears that under the tolls fixed by the Commission, petitioner will fail by a large sum to earn the revenue to which its "wasting asset" is entitled, to the end that petitioner's just obligations to its bondholders and stockholders may be met.

It likewise appears that the court committed serious error in failing to follow the record to its conclusion and in failing to find that the Commission's decision did not accord to petitioner's property its fair and just rights as a wasting asset.

[fol. 221] b. Even if the case be considered not as one of a wasting asset, but as the usual case of fixing the rates to be charged by a public utility, ander the usual rate-making principles, the court made numerous errors in its statements of fact and its conclusions and erred in holding that the rates fixed by the Railroad Commission would not confiscate petitioner's property in the Carquinez Bridge.

We regret to be obliged to advise the court that that portion of its Decision which refers to the issue of confiscation as related to the Carquinez Bridge is replete with serious misstatements of fact and erroneous conclusions. These errors are so numerous and so grave that they alone, in our opinion, require that a rehearing be granted. Among these errors are the following:

(1) The court erred in its statement that "in fixing the tolls for the traffic over Carquinez Bridge consideration was given to the effect of such rates on the company as a whole" (Decision p. 376).

While the Commission's opinion states that consideration will be given to the effect on the company as a whole, we can find nothing in the Commission's decision showing that such consideration was actually given. The Commission's decision contains no figures and no findings of fact to justify [fol. 222] such a conclusion. On the contrary, the Commission expressly refused to consider the Antioch Bridge or the effect of the tolls on the traffic over that bridge.

(2) The court erred in stating that the issue of \$4,300,000 of refunding bonds included "the expenses of the call and reissue". (Decision, p. 376.)

The record shows that said issue of bonds yielded gross cash of only \$4,149,500: (Exh. 1, p. 18—Coleman.)

The cash requirements in connection with said issue were as follows (Exh. 1, p. 18—Coleman):

Face value of called bonds \$4,180,500
Premiums on calling said bonds 131,300
Expenses incident to new issue 43,527:70

\$4,355,327.70

Obviously, obligations totalling \$4,355,327.70 can not be met by the payment of only \$4,149,500.00.

(3) The court erred in the statement that the principal amount of the refunding bonds "was reduced to \$2,491,500 by October 31, 1937". (Decision, p. 376.)

The record shows that the bonds still outstanding on October 31, 1937 were more than \$1,000,000 in excess of the amount stated by the court. (Exh. 21, p. 2.)

[fol. 223] (4) In setting forth the figures in the record bearing on rate base (Decision, p. 377), the court erred in omitting the following figures:

Value of investment—January 1929 (Report of California Highway Commission entitled "Investigation and Report on Toll Bridges in the State of California," p. 67; see also Mitchell, Tr. 66)

\$10,676,142.00

Net purchase price—October 20, 1932 (Report entitled "Report on Investigation of Carquinez Toll Bridge" transmitted by C. H. Purcell, State Highway Engineer, to Earl Lee Kelly, Director of Public Works, and by the latter to Governor Rolph, p. 38; see also Mitchell, Tr. 137)

\$10,288,840.00

(5) The court erred in its statement "that after consideration of all the figures presented, the commission adopted the reported original cost, namely, \$7,949,954, as the reasonable rate base" (Decision, p.377).

As we have already shown, the Commission's decision adopted no figure and made no finding whatever as to any figure which is the reasonable or any rate base. The Commission's brief admitted this to be the fact.

[fol. 224] (6) The court erred in stating that specified "percentages of net income had been earned by the company" in the years 1927-1937, inclusive (Decision, p. 377).

These figures related to the Carquinez Bridge alone after the Commission amputated the Antioch Bridge. Furthermore, the record shows, without any contradiction whatever, that the figures on which the percentages of alleged "net income" were computed were the lowest reliable figures in the record and that they were too low for use as a rate base because they included interest during construction on the bond money alone and also included no allowance for the value of the franchise of the Rodeo-Vallejo Ferry Company (Ready, Tr. 725-6). Also, the figures are too low for use as a rate base because they contain no allowance for the cost of developing the business or going concern value.

(7) The court erred in indicating that the petitioner had urged that "past deficits should be included in the computation of the base for toll regulating purposes" (Decision, p. 378).

The petitioner made no such claim. It is very rare that past deficits are included in the base for regulating rates. What the petitioner did claim was that in fixing tolls for its "wasting asset" the tolls should be fixed high enough so [fol. 225] as to enable petitioner to pay its bonds and retire its capital stock, with reasonable interest and dividends in the meantime, because it will lose the property without the payment to it of any compensation whatever upon the expiration of the franchise in 1948.

(8) The court erred seriously in the following statement (Decision, p. 378):

"The petitioner does not dispute the reasonableness in adopting the reported original cost as a rate base.

This statement is absolutely without warrant and we ask that it be withdrawn, on rehearing.

In the event that the Commission had applied the wasting asset theory fairly and logically and consistently up to 1948, so that petitioner could have met fully its obligations to its bondholders and its stockholders, petitioner would have been willing to use as a base for the computations the reasonable original cost as corrected in its briefs.

But that is a far cry from asserting that such figure would be the fair value of the property or would be a just and reasonable figure to use as a rate base in a case which fails to apply the wasting asset theory but undertakes to proceed along the conventional valuation and rate-fixing lines. The original cost is by far the lowest valuation figure in the record entitled to consideration and is utterly inadequate as a rate base in the usual case of fixing the rates to be charged by a public utility under the usual rate-making principles.

[fol. 226] While we have at times used the reasonable original cost in the computations in our briefs, the figure has been very definitely designated as merely a "minimum" figure and for the purpose of showing the confiscatory character of the Commission's tolls even when applied to the very lowest valuation figure in the record.

There is no warrant whatever for the court's statement that "petitioner does not dispute the reasonableness in adopting the reported original cost as a rate base."

The fact is directly to the contrary.

(9) The court erred in failing to find that the amount to be included in reasonable original cost for the item of interest during construction is the sum of \$1,070,761.00, instead of only \$688.892.56 (Decision, p. 378).

The Commission's own expert, Mitchell, testified that said sum of \$688,092.56 is too low in the sum of \$415,541.44 and that the correct amount should be \$1,103,634.00 (Mitchell, Tr. 241-2; Exh. 16, pp. 15, 19, col. 2—Mitchell).

Mr. Ready reported the somewhat lower figure of \$1,070,761.00 (Exh. 117, p. 27, col. 2) which lower figure petitioner is willing to accept.

The Commission's use of the figure of \$688,092.56 is directly contrary to the only testimony on the subject in the record. It is contrary to the testimony not only of petitioner's very fair and able witness. Mr. Ready, but also to

[fol. 227] the testimony of the Commission's own sole wit-

ness on that subject.

The Commission's treatment of the matter, furthermore, is contrary to the practice theretofore uniformly pursued by the Commission. Thus, in Application of City of San Diego for order establishing rates to be charged for water, 4 C. R. C. 902, the California Commission said (p. 915):

"Considerable attention was given at the hearing to the question of interest during construction. It appears that the amount shown for interest on the books of the Southern California Mountain Water Company represents only interest on borrowed money and that no entry appears on the books to represent interest on money secured through other means, such as the sale of stock. It is, of course, clear that interest during construction should be allowed on all moneys, from whatever source secured, which were spent for capital account during a reasonable construction period."

The Decision herein cites no case whatever in support of the court's conclusion. We submit that in the light of the testimony in this case, as well as in accordance with the Commission's own prior policy. Mr. Ready's said figure of \$1,070,761.00 is the minimum allowance which should have been made for the item of interest during construction under the head of reasonable original cost of the Carquinez Bridge.

(10) The court erred in holding that no allowance whatever need be made for the cost of developing the business

or going concern value (Decision, pp. 378-80):

The Commission's decision shows affirmatively that the [fol. 228] Commission made no allowance whatever for the cost of developing the business or going concern value. The court's Decision states that the Commission "allowed all that could be required of it"—which allowance was just nothing.

This holding is directly contrary to a long line of decisions of the Supreme Court of the United States, among the most recent of which is McCardle v. Indianapolis Water Co., 272/U. S. 400. At page 414, the court said:

"The decisions of this court declare: 'That there is an element of value in an assembled and established plant,

doing business and earning money, over one not thus advanced; is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 165; Denver v. Denver Union Water Co., 246 U. S. 178, 191, 192. And see National Waterworks Co. v. Kansas City, 62 Fed. S53, 865; Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203, and cases cited.

In reaching its conclusion herein (Decision, p. 379), the court relied on Los Angeles Gas & Electric Corporation v. Railroad Commission of California, 289 U. S. 287. However, an examination of that case shows that it is authority for the petitioner herein and does not support the conclusion of the court herein.

At page 313, the Supreme Court of the United States in the Los Angeles Gas & Electric Corporation case refers with approval to the long line of decisions of the Supreme Court relied upon by petitioner herein and showing the [fol. 229] necessity of making allowance for the item of cost of developing the business or going concern value.

The court in that case found that the Railroad Commission did find a rate base which was sufficiently high to include an allowance of \$5,500,000 for the item of going concern value. With reference to said sum, the court says:

"that 'the entire excess (of \$5,500,000.00) may be regarded as applicable to whatever tangible value the property had as a going concern" (p. 317).

# Continuing, the court said:

"The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

The allowance of \$5,500,000.00 for going concern value constituted 8.4 per cent of the Commission's rate base of \$65,500,000.00 (p. 319). On the other hand, the allowance of \$300,000.00 claimed by petitioner in the present case is less than 5 per cent of the cost of reproducing new the physical property in the Carquinez Bridge.

That the amount claimed by petitioner herein is entirely feasonable is shown by the allowances found to be proper in a large number of decisions of the Federal Courts which petitioner set forth on pages 148-51 of its opening brief, to which the court is respectfully referred.

The cases of Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 292 U. S. 290, and Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 292 U. S. 398, cited by the court herein (Decision, p. 379) are not at [fol. 230] all at variance with the general principle established by the long line of decisions of the Supreme Court of the United States, on which petitioner relies. In said two cases, it appeared affirmatively on their facts that the State Commission had given all required recognition to the element of going concern value "as a contributory factor in other elements of value" (Dayton Power & Light Co. case, 292 U. S. 290, 308) and that the going concern value "was reflected in the other items and particularly in the appraisal of the physical assets as part of an assembled whole" (Columbus Gas & Fuel Co. case, 292 U. S. 398, 411).

The situation in the present case is entirely different. The Commission here made no finding that it had given any consideration whatever to the element of going value and the decision shows affirmatively that no consideration was given to the matter.

This court undertakes to justify the Commission in giving no consideration to this element of value and in failing to make any allowance whatever for it.

In this, the Railroad Commission and the court committed clear error of law.

hazards and risks stressed by the petitioner were unquestionably taken into consideration by the commission and are reflected in the rate base adopted (Decision, p. 380).

We respectfully suggest that this is merely an unsubstan[fol. 231] tial surmise. There is nothing in the Commission's decision to show that as much as a single nickel was added to or included in "the rate base adopted" (assuming that the Commission did adopt some rate base) by reason of the very great hazards and risks which the record shows necessarily attended the construction of this notable pioneer enterprise.

(12) The court erred in the statement that "in computing the net annual receipts, allowances were made for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period" (Decision p. 380).

The Commission made no findings as to any of these matters. Hence it is impossible to determine what the Commission did as to any of them.

Furthermore, the Commission was undertaking to fix tolls for 1938 and not for the entire remaining life of the property and it was not at all undertaking to amortize the entire investment.

In fact, Exhibit A, attached to the Petition for Rehearing before the Railroad Commission, shows very definitely that on evidence introduced by petitioner as to all the years to and including 1948 (which evidence was in no way challenged in the Commission's decision or in its brief) the tolls fixed by the Commission, assuming year by year the full amount of augmentation of business, would fail by \$2,841, [fol. 232] 767.00/to permit petitioner to pay its bonds, retire its stock at only \$1.00 per share, and pay reasonable interest and dividends.

(13) The court erred in drawing attention to possible increases in volume of traffic (Decision, p. 380) without at the same time drawing attention to the fact that Mr. Hunter (for the Commission) and Mr. Ready (for the petitioner) agreed that under a 50¢ toll the stimulation would be 13½% and that the final figures of both experts already include and account for any and all increases in the volume of the traffic.

On the record in this case, no further revenue can properly be added, by reason of further growth in the volume of traffic, to the figures already reported by the two engineers.

(14) The court erred in its statement that "it cannot be said that inadequate return has not been afforded to the petitioner" (Decision, p. 380).

As petitioner showed in its opening brief (pp. 134-183) and its closing brief (pp. 89-144), the tolls fixed by the Commission for the Carquinez Bridge, will yield a return

not in excess of 6.6% on the lowest possible base figure [fol. 233] entitled to consideration and to be found in the record. The return on the fair value of the property would be substantially less.

A return of only 6.6 per cent would be

- less than the return of 7.5 per cent which the Commission found that petitioner should receive;
- —less than actual cost in 1938 of all the money in the project, determined without dispute to be 7.851 per cent (Exh. 129, p. 5—Ready);
- —less than the cost of money in connection with the original bond issue of 1925, determined by Mr. Coleman and Mr. Ready to be 9.71 per cent (Exh. 1, p. 17—Coleman; Exh. 129, p. 1—Ready);
- —less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95 per cent (Exh. 129, p. 3—Ready):
- -far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money; and
- -substantially less than the rates of return which the [fol. 234] Federal courts have required to avoid confiscation even in the cases of well-established and prosperous utilities.

Such a return is clearly confiscatory.

(15) The court, while conceding that the historical cost of its money as claimed by petitioner is correct, erred in holding that petitioner is not entitled to a rate of return as great as such cost but must be limited to a return based on the cost of money in connection with the refunding bond issue of 1935 (Decision, p. 380).

The record shows the following costs of money to peti-

Cost of money in connection with the original bond issue of 1925, determined by Mr. Coleman and Mr. Ready to be 9.71 per cent (Exh. 1, p. 17—Coleman, Exh. 129, p. 1—Ready).

Cost of money in connection with the refunding bond issue of 1935, determined to be 8.95 per cent (Exh. 129, p. 3—Ready).

Cost of all the money used by petitioner in the construction of its works, including the moneys secured from all sources, both bonds and stock and depreciation reserve, [fol. 235] which for the year 1938 is 7.851 per cent (Exh. 129, p. 5—Ready).

If the court's theory that the rate of return is to be fixed on the basis of the cost of money in connection with the last refunding bond issue is to be accepted, then it inevitably follows that the tolls fixed by the Commission are confiscatory for the reason that the yield (even if the 7.5 per cent referred to by the Commission is correct) is substantially less than the actual cost of money in connection with said refunding bond issue, shown by the record to be 8.95 per cent (see, also, Petitioner's Closing Brief, pp. 127-131).

However, we respectfully submit that the court's theory, is patently erroneous because

- (a) The theory overlooks entirely the cost of money in connection with the original bond issue;
- (b) The theory overlooks completely the cost of all money derived from the sale of capital stock and from other sources other than bonds;
- (c) The theory looks solely to the cost of money in connection with the tag end of the last refunding bond issue, which is obviously wrong:
- (d) The theory overlooks completely the Railroad Commission's own established policy of allowing a rate of [fol. 236] return somewhat in excess of the average cost of money to the utility;
- (e) The theory overlooks completely the fact that a hazardous enterprise such as the Carquinez Bridge is entitled to a rate of return substantially greater than that allowed to the well established and stable public utilities of the State.

For a detailed development of the above points, with complete references to the testimony bearing thereon, the court is respectfully referred to petitioner's opening brief (pp. 166-183) and petitioner's closing brief (pp. 122-144)

(16) The court erred in holding that rates should be fixed on the basis of the Federal income taxes paid in a year other than that for which the tolls were being fixed (Decision, p. 380).

The problem in this rate case was to determine how many dollars petitioner would require to meet its obligations for the year 1938, being the year for which the Commission was fixing the tolls. Would the tolls established by the Commission be sufficient to enable the petitioner to meet those obligations in 1938 and still have remaining a sufficient sum to yield to it a fair return on the fair value of the property?

[fol. 237] This problem is to be solved, not by technical accounting rules or practices adopted in connection with entirely different matters, but by determining the number of dollars which the petitioner will require, in the year 1938, to meet the obligations with which it will be confronted in that year, including the payment in 1938 of Federal income tax necessarily determined on the 1937 income.

Mr. Ready so testified (Exh. 134, p. 2, 1938) and his testimony, in addition to being sound in principle, is the only testimony in the record as to what allowance for Federal income taxes must be included in computing the tolls for 1938. No witness for the Commission testified on that subject and there is not a word of testimony in the record contrary to that offered by Mr. Ready.

We respectfully submit that matters of this kind should be determined by the testimony in the record.

(17) The court erred in not entering judgment setting aside the order and dision of the Commission by reason of the failure of the Commission to make any of the basic and essential findings of fact as to the Carquinez Bridge which are required to support the Commission's order and decision.

These basic and essential findings have been set forth in an earlier portion of this petition, to which the court is respectfully referred. These are the basic and fundamental [fol. 238] matters as to which any administrative tribunal fixing rates to be charged by a public utility should make findings of fact. As to none of them did the Railroad Com-

10. The court erred in upholding the Railroad Commission's action in severing the Antioch Bridge from the remaining portion of petitioner's single, unified transportation system and in fixing rates for the Carquinez Bridge alone.

In connection with this point, we submit the following specifications of error, which, we believe, require that a rehearing be granted herein:

(1) The court erred in its statement that the Railroad Commission was justified in concluding that the Carquinez and the Antioch Bridges are not integrated into a single transportation system (Decision, p. 375).

In reaching this conclusion, the court not merely disregarded the uncontradicted testimony and exhibits to the contrary of the Commission's own witnesses (Exh. 1, p. 25—Coleman; Coleman, Tr. 290-1; Mitchell Tr. 144; Exh. 3, p. 2—Mitchell), but also found contrary to findings made by the State Highway Engineer and the Department of Public Works of the State of California before the present controversy arose.

[fol. 239] The court's statement is at variance with the "Report on Investigation of Carquinez Toll Bridge" dated October 20, 1932, prepared by the State Highway Engineer and the Director of Public Works in which "attention is again directed to the fact that the American Toll-Bridge Company owns and operates as one project, both the Carquinez and Antioch Toll Bridges" and that, therefore, it is "necessary to consider the future earnings of the two bridges in order to arrive at a reasonable price "" (Mitchell, Tr. 133).

The Railroad Commission's action and the court's statement are directly contrary to all the testimony on that subject.

(2) The court erred in its statement that the fact that the Carquinez and the Antioch Bridges are competitive justifies the Commission in excluding the Antioch Bridge (Decision; p. 375).

We submit that the very contrary is the fact.

The record shows, without any contradiction, that, as the Antioch-Bridge serves substantially the same territory and

the same traffic as the Carquinez Bridge, the inevitable effect of the Commission's decision, if it stands, would be to force petitioner to reduce the Antioch Bridge tolls to the same level as the Carquinez Bridge tolls, thus reducing the gross and the net revenue of petitioner below the point to which the Commission could go without confiscation. The Comfol. 240 mission would thus accomplish indirectly what it could not accomplish directly.

It is because of this inevitable effect of the tolls of one bridge on the tolls of the other bridge, due to the competitive situation; that the problem must be considered as a whole. It is largely for this reason that the Railroad Commission should have dealt with the property as a whole and ascertained the fair value and reasonable operating, maintenance, depreciation and amortization expenses and a fair rate of return for both bridges.

(3) The court erred in its statement that the fact that neither bridge is used or useful in any service performed by the other justifies the Commission in excluding the Antioch Bridge (Decision, p. 375).

We respectfully submit that the fact whether either bridge is used or useful in any service performed by the other is not material in connection with the question whether tolls should be fixed for both bridges together or for the Carquinez Bridge alone.

No authority is cited establishing any such test.

The Commission itself has never, in so far as we can ascertain, applied any such test? Thus in City of San Diego v. San Diego Consolidated Gas and Electric Company, 37 C. R. C. 167, in a decision written by Commissioners Seavey and Carr, the Commission considered the company's electfol. 2411 tric business and its newly acquired natural gas business as a single business and fixed rates accordingly, even though it could not be said that the electric properties were being used or useful in the service being performed by the natural gas properties.

Again, in Coney v. Broad River Power Co., 171 So. Car. 377, 172 S. E. 437, the court held that the Railroad Commission of South Carolina should have fixed rates on a consideration of the entire property, both the electric system and the street railway system, although neither of these systems was used or useful in the service performed by the other.

The electric system did not require the rails and ties of the street railway system nor were the street railway cars used or useful in any service performed by the electric system.

We submit that the test thus set down by the court in its Decision herein is an entirely false test, which is supported

neither by reason nor by authority.

(4) The court erred in its statement that the fact that public utility rates have frequently be a fixed for less than the public utility's entire property justifies the Commission in excluding the Antioch Bridge (Decision, p. 375).

The proposition that less than the entire property of a public utility is frequently fixed as the appropriate unit for rate making purposes is too well known to justify the citation of authority. Thus, it would be ridiculous to say that [fol. 242] in fixing the rate to be charged by Southern Pacific Company for the transportation of freight between two local points it would be necessary to ascertain the value of that Company's entire property.

However, the fact that in many instances rates are fixed for only a portion of a public utility's system is, in our opinion, no justification whatever for excluding from consideration a portion of a transportation system which is parallel with and almost adjacent to the portion for which rates are to be fixed and which, by reason of the competitive situation, will be immediately, directly and seriously affected by the rates established for the neighboring portion of the same transportation system.

In such a case, "the rudimentary requirements of fair play" as well as proper rate making principles, require that

the problem be considered as a whole.

(5) The court erred in finding that petitioner purchased the Antioch Bridge for the purpose of reducing competition or purchased it at all (Decision, p. 375).

There is no warrant in the record for the statement that petitioner purchased the Antioch Bridge for the purpose of reducing competition or at all. The simple fact is that petitioner itself built both the Carquinez and the Antioch Bridges as parts of a single transportation enterprise (Exh. 1, pp. 1-2—Coleman).

[fol. 243] (6) The cases cited by the court do not sustain its conclusion as to the Antioch Bridge (Decision, p. 375).

The court cites Wabash Electric Co. v. Young, 287 U. S. 488, Gilchrist v. Interborough Rapid Transit Company, 279 U. S. 159, and International Railway Co. v. Prendergast, 1 Fed. Supp, 623, but none of these cases support the court's conclusion.

In the Wabash Electric Co. case, the electric system in the City of Mar insville, Indiana, had always been treated by all parties as a separate unit of a larger system, for rate making purposes. The Indiana Commission was, of course, justified in continuing to treat it as such separate unit. Furthermore, there was here no competitive feature whatever between different portions of a single, unified public utility system.

In the Gilchrist case, the elevated and the subway operations of the street railway system had always been kept financially distinct; also the owner of the system had itself treated them separately for rate making purposes and had filed with the Transit Commission an application for a 5¢ fare on the subways alone, without asking any relief at that time as to the elevated lines (p. 206). On this state of the record, the Supreme Court properly pointed out that "the two systems have been treated as separate and upon this record must be so regarded" (pp. 209-10). This case, accordingly, cannot properly be cited in support of the court's conclusion herein.

In the International Railway Co. case, the question at issue was whether or not the street railway fares in the City [fol. 244] of Buffalo were confiscatory. The Company urged that the Public Service Commission should have included in the rate base street railway systems in other cities and two international bridges across Niagara Falls. The court very properly pointed out that with the acquiescence of the Company the Public Service Commission had theretofore treated the Buffalo street railway portion of the system as a separate unit of operation. Quite naturally, the Company's position was held to be untenable.

The case is, of course, entirely different on its facts from that now before this court. There was no showing of any competitive situation between the street railway system in Buffalo and the Company's other properties. Nor did the street railway, roperties in the other cities or the two international bridges serve the same territory or any part thereof as the street railway system in the City of Buffalo. The International Railway Co. case was not a case in which

the reduction of the rates of a public utility on one part of its system would have the inevitable effect, by reason of the play of competitive forces, of compelling the public utility to make a similar reduction in the rates on a parallel portion of a single, panified transportation system.

(7) The court erred in its analysis of Cone, v. Broad River Power Company, 171 S. C. 377, 172 S. E. 437.

At page 376 of its Decision, the court refers to -- Coney case as follows:

[fol. 245] "The condition existing in this case, namely, that neither the Carquinez bridge nor the Antioch bridge is to any degree used or useful in the public utility service and operation of the other, distinguishes it "rom the case of Conex v. Broad River Power Company, 17. S. C. 377, 172 S. E. 437, relied upon by the petitioner. There the decision was that the commission in computing a rate base for tolls to be charged by the power company for furnishing electric energy, could not exclude from consideration the properties of the street railway system owned and operated by it. But that conclusion specifically depended on the fact there appearing that the functions were related and that all the properties were used or useful in the company's business of generating electricity and in its related business."

We respectfully submit that the court's analysis of the Coney case is not correct. The question at issue was whether the Railroad Commission of South Carolina, in fixing rates to be charged by Broad River Power Company, could consider its power system separately, or whether it must also include the Company's street railway system. The court found that the Commission should consider all the properties as a single system and fix the rates accordingly.

But the court did not find that "all the properties were used or useful in the company's business of generating electricity and in its related business".

How could any court find that all the property of a public utility power system is used and useful in the operation of a street railway system or that all the rails, ties and cars of a street railway system, are used and useful in the operation of a power company?

Such things simply do not happen.

[fol. 246] There is nothing in the Coney case which justified the court's conclusion that the Railroad Commission could exclude the Antioch Bridge because that bridge is not used in the operation of the Carquinez Bridge. As we have already shown, this is a false test which is not sustained by either reason or authority.

(8) The court erred in making the statement that the extent to which "the single ownership of such competing units subserves the public welfare and protects the correlative rights and interests of the franchise holders and the public is a question primarily for the commission to decide" (Decision, p. 376).

We respectfully draw the court's attention to the fact that the Railroad Commission never has had and does not now have any such responsibility or authority.

The Carquinez and the Antioch Bridges were constructed long before the Railroad Commission had any authority of any kind over toll bridges. The questions of public policy with reference to those bridges were decided by other agencies of the State.

Furthermore, the Railroad Commission does not at this time have any authority or responsibility whatever to determine whether or not the single ownership of the Carquinez and the Antioch Bridges does or does not serve the public welfare.

[fol. 247] (9) The court erred in making the statement that "the petitioner is not entitled to have the investment and operating expense of both bridges included in the rate base upon which to compute a toll for Carquinez bridge" (Decision, p. 376).

Petitioner has never claimed the right to include the operating expenses of either or both the bridges in the rate base. Petitioner has never heard of a case in which it has been held that operating expenses can be included in a rate base.

Furthermore, petitioner has never claimed that either the investment or the operating expenses of both bridges should be included in the rate base upon which to compute a toll for the Carquinez Bridge alone.

What petitioner has contended and still contends is that the Commission should not have excluded the Antioch

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Bridge but should have fixed the tolls to be charged by both bridges and that in doing so, it should have considered and made definite findings as to valuation, operating expenses, depreciation, amortization, gross revenue, net revenue and rate of return as to both bridges.

As petitioner has never made the claims attributed to it by the court, we believe that the above statement should, on rehearing, be eliminated from the Decision.

[fol. 248] (10) The court erred in failing to find that the Commission's exclusion of the Antioch Bridge was unfair and arbitrary and deprives petitioner of its property without due process of law in violation of the guarantees of the State and Federal Constitutions.

That the exclusion of the Antioch Bridge, so as to enable the Commission to cut the tolls of the Carquinez Bridge deeper than otherwise would have been the case, relying then on the force of competition to pull the tolls of the Antioch Bridge down to those thus fixed for the Carquinez Bridge, was action denying to petitioner "the rudimentary requirements of fair play" would seem to be too clear to require any argument.

This point, together with the decisions of the Supreme Court of the United States on which we rely in this connection, are fully set forth in petitioner's opening brief (pp. 131-133) and petitioner's closing brief (pp. 144-151), to which the court is respectfully referred.

11. The court erred in failing to hold that the Railroad Commission's decision would confiscate petitioner's property in both the Carquinez and the Antioch Bridges.

In petitioner's opening brief, petitioner showed that a minimum fair value of the Carquinez and the Antioch Bridges together is \$10,780,411 (pp. 183-4); that the tolls [fol. 249] fixed by the Commission would yield a net income available for return on such rate base for both bridges, of \$606.320 (pp. 185-8); and that the rate of return thus made available would be only 5.6 per cent (pp. 187-8).

The Commission's brie did not in any way challenge petitioner's figures as to the Antioch Bridge, either as to fair value, operating revenues, operating expenses or amount remaining for fair return on fair value. figures were prepared by the same witnesses-principally

Mr. Ready—in the same manner and in accordance with the same principles as were used in the preparation of the similar figures as to the Carquinez Bridge. On the record herein, they must be accepted as correct.

On these conceded figures as to the Antioch Bridge plus the demonstrated figures as to the Carquinez Bridge hereinbefore set forth, it follows, on the record in this case, that the tolls established by the Commission would yield a return of only 5.6 per cent on a minimum fair value of both bridges.

A return of only 5.6% on both bridges together would be-

- (1) 7.5% 5.6% = 1.9% below the rate of return which the Commission found would be reasonable for the Company;
- (2) 9.07% 5.6% = 3.46% below the cost of bond money [fol. 250] actually used in the construction of the Company's bridges; and
- (3) 8.95% 5.6% = 3.35% below the cost of money resulting from the bond refunding operation of 1935.

We believe it to be too clear for further discussion that the Commission's tolls will, if permitted to become effective, confiscate the transportation system of American Toll Bridge Company, consisting of the Carquinez and the Antioch Bridges, and violate the Company's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States and under Sections 13 and 14 of Article I of the Constitution of California.

# III

Procedure Before Railroad Commission—Denial of Due Process of Law

12. The court erred in its interpretation of the decision of the Supreme Court of the United States rendered on April 25, 1938 in Morgan v. United States, 304 U. S. 1.

American Toll Bridge Company has heretofore challenged and does now again specifically challenge the validity of the Railroad Commissic 's decision and order on the express ground that said decision and order and the entire proceedings had in connection therewith constitute a denial

[fol. 251] to petitioner of due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

In Morgan v. United States, 304 U. S. 1, decided on April 25, 1938, the question at issue related to the validity of an order of the Secretary of Agriculture fixing the rates to be charged by market agencies at the Kansas City stockyards. The question arose under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. A., sec. 181-229.

In holding that the requirements of due process of law had not been met, the court pointed out that "in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play" (pp. 14-15).

At page 18, Chief Justice Hughes states the real point of the case as follows:

"Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

The Chief Justice then examined the procedure before the Secretary of Agriculture in order to determine whether or not the appellants "in their contest with the Government in a quasi-judicial proceeding aimed at the control of their activities" had or had not been "fairly advised of what the Government proposes" and whether or not they had been "heard upon its proposals before it issues [fol. 252] its final command".

As bearing on said questions, which constituted the real issue in the case, the court naturally addressed itself primarily to the question whether or not the issues had been properly defined. That would be the normal and usual way of advising "what the Government proposes".

In pursuing its inquiry, the court found (p. 19):

- (1) The proceeding was initiated by a mere notice of inquiry into the reasonableness of appellant's rates;
  - (2) No formal complaint was formulated;
- (3) There was no report by an examiner and no proposed findings were served by the Government;

- (4) While there was oral argument, counsel for the Government did not adequately state the Government's claims; and
  - (5) The Government did not file a brief.

Based upon that analysis of the facts, the court concluded that appellants had not been advised of what the Government proposed and had been denied due process of law (p. 19).

At page 20, the court stresses the point that in all substantial respects the Government was prosecuting the proceeding and that "the proceeding had all the elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on [fol. 253] the other". In such a proceeding, says the court, the appellants are entitled

"to have a reasonable opportunity to know the claims advanced against them" (p. 21).

# At page 22, the court concluded:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

We submit, very respectfully, that in its Decision in the present case, this court entirely missed the point of the Morgan case.

While the findings made by the Secretary of Agriculture were numerous and some of them elaborate, there is nothing in the case to indicate that these facts, which were referred to by this court (Decision, p. 381) had any particular bearing on the decision.

While it is true, as further pointed out by the court herein, that mere lack of opportunity to examine and object to proposed findings before the decision is rendered does

not in and of itself show lack of due is cess of law, (Decision, p. 381) it is also true that where, in a proceeding of this kind instituted by the Government, there was no complaint, brief or argument on behalf of the Government [fol. 254] which informed the ordered party of the contentions on which the order sought to be made was to be based, the court will look further to see whether the essential information was given to said party in proposed findings served on him by the Government or in some other way. (National Labor Relations Board v. Biles Coleman Lumber Co., 98 Fed. (2d) 16, 18—Denman, Circuit Judge).

This court, in its reference to the Morgan case, entirely missed the point of the case, which was that in a quasi-judicial proceeding instituted by the Government against a public utility it is the duty of the Government, by the usual framing of issues by pleadings or otherwise to advise the party against whom the Government is proceeding "of what the Government proposes" and to give him a fair opportunity "to be heard upon its proposals before it issues its final command".

On May 16, 1938, the Supreme Court, of the United States decided the case A National Labor Relations Board v.

Mackay Radio & Telegraph Co., 304 U.S. 333.

The rules of the National Labor Relations Board provide that formal proceedings are instituted through the filing and service by the Board of a formal complaint, to which is attached a copy of the charge. The respondent then files a formal answer (Rules and Regulations, National Labor Relations Board, Series 1, as amended, Article II, Sections 5-10). From the court's decision, it appears that in the Mackay case this procedure had been followed. The Board had filed a formal complaint, to which the respond-[fol. 255] ent had filed a formal answer. After the completion of its testimony, the Board filed an amendment to the complaint. The respondent filed a general denial to . the amended complaint and presented its evidence op. 340). It thus appears that there is no possible questionbut what the issues were formulated by formal complaint. and answer. The court also specifically pointed out that oral argument was had and that respondent filed a brief (p. 340).

On the question of procedure, the Mackay Company claimed that there was a "variance" between the issues as established by formal complaint and answer and some finding or findings of the Board and the company claimed that if it had been served with proposed findings it could have pointed out the variance. That was the Company's only complaint on any question of procedure before the Board.

Referring to this contention, the court said (p. 349):

"The position is highly technical.—All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities."

The court further said that "it appears that oral argument was had and a brief filed with the Board after which it made its findings of fact and conclusions of law", held that there was no merit in "the alleged fatal variance between the allegations of the complaint and the Board's findings" and concluded as follows (p. 350):

(101.256] "What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U. S. 468, 478. The contention that the respondent was denied a full and adequate hearing must be rejected."

It thus appears that the decision in the Mackay case is in complete harmony with the decision in the Morgan case and with the position of petitioner herein.

On May 31, 1938, the Supreme Court rendered and filed its decision on the petition of the Government for a rehearing in the Morgan case (304 U. S. 23-26). The court again emphasized the crux of its decision in the Morgan case by restating the language hereinbefore quoted by us, as follows (p. 25):

# "We said:

'Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what

the Government proposes and to be heard upon its proposals before it issues its final command.

'No such reasonable opportunity was accorded appellants.

13. The court erred in failing to hold that the facts of the present case on the issue of the procedure before the Railroad Commission fall squarely within the decision in the Morgan case.

Here, as in the Morgan case, petitioner was brought into [20]. 257] contest with the Government (the State) in a quasi-judicial proceeding aimed at the control of petitioner's activities.

Here, as there, the Government prosecuted the proceeding. Here, as there, the proceeding had all the elements of contested litigation, with the uniquenent and its counsel on the one side and petitioner and its counsel on the other.

In examining the facts to ascertain whether petitioner was fairly advised of what the Government proposes, what do we find?

- (1) Here, as in the Morgan case, the proceeding was initiated by a mere order or notice of inquiry. Copy of the document is attached to the Petition for the Writ herein as Exhibit "B". Said document merely provides for an investigation into "the rates, charges, contracts, classifications, rules and regulations" of petitioner in the operation of the Carquinez Bridge. Where, among all these matters, the lightning would strike, or what the State's proposals were, petitioner, at no time prior to the decision, had any means of knowing.
- (2) Here, as in the Morgan case, no complaint was ever filed and under the Commission's procedure none was required.
- (3) Here, as in the Morgan case, no answer was ever filed and no issues were ever framed by any pleadings.
- [fol. 258] (4) Here, as in the Morgan case, the State at no time prior to the decision, ever advised petitioner of what it proposed to do, by means of proposed findings or by any other means.
- (5) Here, as in the Morgan case, the State did not make known what it proposed, by any oral argument or by any brief setting forth such proposals.

The following language from the Morgan case applies exactly to the present situation (p. 19):

"And the appellants (petitioner) had no further information of the Government's (State's) concrete claims until they were served with the Secretary's (Railroad Commission's) order."

We submit that in the present case the court committed seriously prejudicial error by not finding that, on the issue of the procedure before the Railroad Commission, the facts of the present case fall squarely within the decision in the Morgan case.

Petitioner also objects strenuously to the following state-

ment contained in the Decision herein (p. 381):

"It is not contended that the petitioner was not fairly informed of what the issues were to be or that the issues were not clearly defined and understood by all parties concerned during the course of the hearing."

We do not understand how the court could make such a statement. It is absolutely contrary to the facts. Petitioner has contended, most earnestly, and does now contend [fol. 259] that it was not informed, fairly or at all, of what the issues were to be; also that the issues were not defined, clearly or at all; also that there were no issues and hence petitioner did not understand and could not have understood what they were at any time prior to the Railroad Commission's decision.

The court's statement puts petitioner into an entirely false position. The statement is not warranted by anything which petitioner has at any time said or done.

We respectfully ask that on rehearing said entire sen-

tence he eliminated from the Decision.

14. The court erred in holding that the procedure before the Railroad Commission did not deny to petitioner due process of law.

Petitioner earnestly urges that the procedure and the acts of the Railroad Commission constituted a denial to it of due process of law in violation of Section I of Article XIV of the Amendments to the Constitution of the United

States and Sections 13 and 14 of Article I of the Constitution of California for each of the following reasons:

- (1) The procedure before the Railroad Commission denied to petitioner the due process of law to which it is entitled under the principles established by the Supreme Court of the United States and most recently announced in [fol. 260] Morgan v. United States, 304 U. S. 1;
- (2) The acts of the Railroad Commission in excluding the Antioch Bridge and the circumstances of such exclusion were unfair, unjust and arbitrary and constituted a denial to petitioner of due process of law;
- (3) The failure of the Railroad Commission to make findings of fact on the basic and essential facts necessary to support the order makes it very much more difficult for petitioner to protect its rights in subsequent proceedings and constitutes a denial of due process, in addition to making the task of the reviewing courts, State and Federal, unfairly and unreasonably difficult.

The court clearly erred in holding that petitioner has not been denied due process (Decision, p. 381). We urge that a proper holding would be that in each of the above respects petitioner has been denied the due process of law which is guaranteed to it by both the State and the Federal Constitutions.

# Conclusion

We realize fully that the time of this court for the consideration of this petition is limited and regret the necessity of addressing ourselves to so many points. Our justifold 261) fication must be found in the grave importance to this petition of the questions here at issue.

It is our sincere conviction that the judgment in this case is in many important respects erroneous and that the large number and the importance of the points raised fully justify the granting of the petition for rehearing.

It is for these reasons that we respectfully appeal to this Honorable Court for reconsideration of the matters set forth in this petition and that on rehearing the judgment be reversed and the Railroad Commission's order annulled. Dated at San Francisco, California, this 17th day of October, 1938.

Respectfully submitted, Thelen & Marrin, by Max Thelen; Dunn, White & Aiken, by B. R. Aiken and Bauer E. Kramer; Breed, Burpee & Robinson, by Harold C. Holmes, Jr., Attorneys for American Toll Bridge Company, Petitioner.

[fol. 262] Service of this within Petition for Rehearing and receipt of copy thereof is hereby admitted this 17th day of October, 1938.

Ira H. Rowell, Rodwick M. Cassidy, George E. How-

ard, Attorneys for Respondent.

[fol. 263] Railroad Commission of the State of California
Fifth Floor California State Building, Civic Center, San Francisco, Cal.

October 21, 1938.

William H. Waste, Chief Justice, Supreme Court of the State of California, State Building, San Francisco, California.

American Toll Bridge Company vs. Railroad Commission, S. F. No. 16006

DEAR SIB:

A petition for rehearing of the above cause was filed by American Toll Bridge Company on October 17, 1938. In-assuach as the respondent Commission reads the many assignments of error contained in such petition to be merely restatements of points already wholly presented and considered, the Commission will waive the privilege accorded by Rules of Court to make reply thereto.

Respectfully, Ira H. Rowell, Attorney for Railroad

Commission of the State of California.

Rec'd Oct. 24, 1938.

Copy to Thelen & Marrin, Balfour Building, San Francisco, California.

IHR/GEH.

[fol. 264] IN SUPREME COURT OF CALIFORNIA, IN BANK

## [Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed October 27, 1938

By the COURT:

· The Petition for a rehearing herein is denied.

Waste, Chief Justice.

Dated October 27, 1938.

[File endorsement omitted.]

01. 265] IN SUPREME COURT OF CALIFORNIA, BANK

San Francisco, No. 16006

AMERICAN TOLL BRIDGE COMPANY (a Corp.), Petitioner,

VS.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, Wallace L. Ware, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield and Leon O. Whitsell, as Members of and Constituting the Railroad Commission of the State of California, Respondents

On Review from the Railroad Commission of the State of California

# REMITTITUE

The above entitled matter having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged and Decreed by the Court that the Order of the Railroad Commission of the State of California in the above entitled cause, be and the same is hereby affirmed. The order of this court directing a stay pending determination in this proceeding is discharged.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 27th day of September, 1938, and now remaining of record in my office.

Witness my hand and the seal of the Coart, affixed at my

office, this 28th day of October, A. D. 1938.

B. Grant Taylor, Clerk, by I. M. Johnson, Deputy. (Seal.)

11498.

[fol. 266]

[File endorsement omitted]

[fol. 267] SUPREME COURT OF THE UNITED STATES

# [Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER-FOR REVERSAL—Filed October 28, 1938

# Petition for Appeal

To the Honorable, William H. Waste, Chief Justice of the Supreme Court of the State of California:

Comes now American Toll Bridge Company, a California corporation, appellant in the above entitled cause, by its

attorneys, and respectfully shows that:

On the 27th day of September, 1938, in the above entitled cause, the Supreme Court of the State California, the highest Court of said State in which a decision in said cause could be heard, rendered a certain judgment against [fol. 268] said appellant and in favor of said appellees, affirming that certain order of the Railroad Commission of the State of California rendered on the 8th day of February, 1938, designated as Decision No. 30,612, in which order said Railroad Commission fixed the tolls to be charged by said appellant for the transportation of passengers, on foot or in vehicles, and of automobiles, over its so-called Carquinez Bridge across the Straits of Carquinez between the Counties of Contra Costa and Solano, in the State of California.

On the 17th day of October, 1938, said appellant filed with the Supreme Court of the State of California its Petition for kehearing, which Petition was denied by said Court on the 27th day of October, 1938. Said judgment of said Court of September 27, 1938, became operative and final on the 27th day of October, 1938.

In the record and proceedings and in the rendition of said judgment of September 27, 1938, and in permitting the same to become final, manifest error occurred greatly to appellant's damage, whereby appellant feels aggrieved and does hereby appeal from said judgment to the Supreme Court of the United States.

In the record and proceedings and in the rendition of said judgment there was drawn in question by appellant herein the validity of said order of the Railroad Commission of the State of California, which said order was made [fol. 269] and entered by the Railroad Commission under Sections 22 and 23 of Article XII of the Constitution of the State of California and under that certain Act of the Legislature of the State of California known and designated as the "Public Utilities Act", Statutes 1915, chapter 91, page 115, as amended by the Act of July 1, 1937, Statutes 1937, chapter 896, page 2473, on the ground that said order was in contravention of, and repugnant to, various specified provisions of the Constitution of the United States, and the judgment of said Court was in favor of the validity of said order.

In said proceedings there was drawn in question the construction and application of two several clauses of the Constitution of the United States, namely, the clause of Section 10 of Article I of the Constitution of the United States which prohibits the State of California from passing any law impairing the obligation of contracts and the clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States which prohibits the State of California from depriving appellant herein of its property without due process of law and from denying to appellant the equal protection of the laws. The decision and judgment of the · Supreme Court of California were in favor of the validity of said order of the Railroad Commission and against the rights, titles, privileges and exemptions specifically set up and claimed by appellant herein under each of said clauses [fol. 270] of the Constitution of the United States, all of which is fully apparent in the record and proceedings of the case and in the rendition of said decision and judgment and is specifically set forth in the Assignment of Errors next hereinafter set forth.

# Assignment of Errors

Said American Toll Bridge Company, appellant herein, assigns the following errors in the record and proceedings of said case:

# Impairment of Contract Obligations

1. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order establishing the tolls to be charged and collected by appellant for pedestrians and automobiles using appellant's Garquinez Bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, did not impair the obligation of the contract evidenced by Ordinance No. 171 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract and the acceptance of the provisions of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.

# [fol. 271] Denial of Due Process of Law—Confiscation of Property

- 2. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.
- 3. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not fail to recognize and to give effect to the rights of appellant in a wasting asset, namely, the Carquinez Bridge, the title to which will revert to the Counties of Contra Costa and Solano on the expiration in 1948 of the franchise granted by said Ordinance No. 171 for the construction and operation of the Carquinez Bridge, and in holding and deciding that the Railroad Commission's order

did not confiscate appellant's property in said Carquinez. Bridge and did not constitute a deprivation of said property, without due process of law, and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

4. The Supreme Court of the State of California erred [fol. 272] in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in both the Carquinez and the Anticch Bridges and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

# Denial of Due Process of Law—Procedure Before Railroad Commission

- 5. The Supreme Court of the State of California erred in holding and deciding that the procedure before the Railroad Commission was not unfair, unjust and arbitrary and did not constitute a denial to appellant of due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.
- 6. The Supreme Court of the State of California erred in failing to hold that, even though the language of Sections 2845 and 2846 of the Political Code of the State of California be regarded as the language of regulation and not the language of contract, the Legislature of 1937, in declaring toll bridges to be public utilities, did not amend or repeal said sections of the Political Code or any part thereof and that it was the duty of the Railroad Commission, stepping into the shoes of the Board of Supervisors of said Contra Costa County, to follow, in fixing appellant's said [fol. 273] tolls, the rate making standard fixed and prescribed by the Legislature with reference to toll bridges, in said Sections 2845 and 2846 of the Political Code, and said Supreme Court of the State of California further erred in failing to hold that the Railroad Commission's failure to follow the standard of reasonableness of rate making for toll bridges theretofore established by the Legis-

lature constituted a denial to applicant of due process of law and a denial of the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

- 7. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order severing the Antioch Bridge from appellant's single, unified transportation system, and fixing tolls for the Cardinez Bridge alone, notwithstanding the fact that the record shows without dispute that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by the force of competition between the two bridges, compel appellant to make a similar reduction in the tolls charged on the Antioch Bridge, was not unfair, unjust and arbitrary action and did not deny to appellant due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.
- 8. The Supreme Court of the State of California erred [fols. 274,326] in holding and deciding that the procedure before the Railroad Commission, particularly the institution of the case by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges, and the conduct of the inquiry thereafter without the formulation of any issues by the filing of answer or in any other way, and the Railroad Commission's failure to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, did not deny to appellant due process of law and did not deny to it the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

# Prayer for Reversal

For which errors said American Toll Bridge Company, appellant herein, prays that the said decision and judgment of the Supreme Court of the State of California, dated September 27, 1938, in the above entitled cause, be reversed and that a judgment be rendered in favor of said appellant herein, and for costs.

Dated at San Francisco, California, this 28th day of

October, 1938.

Max Thelen, B. R. Aiken, Counsel for Appellant.

[fol. 327] [File endorsement omitted]

[fol. 328] SUPREME COURT OF THE UNITED STATES

# [Title omitted]

ORDER ALLOWING APPEAL—Filed October 28, 1938

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of California on the 27th day of September, 1938, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors, Prayer for Reversal and Statement as to Jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of California in the [fol. 329] above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of California shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of the United States so that he shall have the same in said Court within sixty (60) days of this date.

And it is further ordered that the suspending bonds now on file with the Supreme Court of the State of California in the above entitled suit remain in full force and effect throughout the pendency of the said appeal proceedings; that security for costs on appeal be fixed at the sum of \$500.00, and that upon approval of bond in said amount this

order shall operate as a supersedeas.

Dated at San Francisco, California, this 28th day of October, 1938.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 330-333] (Supersedeas bond on appeal approved, and to operate as a supersedeas, and filed October 28, 1938, omitted in printing.)

[fols. 334-347] (Citation, with statement directing attention to Rule 12, Paragraph 3 of Rules of Supreme Court of United States, with admission of service endorsed thereon, filed October 28, 1938, omitted in printing.)

[fol. 348] Before the Railroad Commission of the State of California

[Title omitted]

# Transcript of Proceedings, Testimony and Exhibits

### COLLOQUY

Commissioner Riley: The Commission will be in order. This is the time and place set for the hearing of Case No. 4244, being the investigation on the Commission's own motion in regard to the operations, rates, contracts, rules, and so forth, of the American Toll Bridge Company, the San Francisco Toll Bridge Company and Dumbarton Toll Bridge Company, toll bridge corporations as defined in Statutes of 1937, Chapter 896; also Case 4259, likewise an investigation into the rates of the American Toll Bridge Company covering the toll bridge over the Campany at San Francisco.

Before taking the appearances I would like to state that in Case 4244, which covers all of the toll bridges declared to be public utilities that, in so far as the general investigation is concerned, the Commission has not made a sufficient investigation to report at this time. However, I would like to take the appearances with respect to the general case, and then the appearances for the American Toll Bridge Company. So if the reporter will please take the appearances in Case 4244.

Commissioner Riley: The Highway Commission is to be represented here this morning, their attorneys are on the way but are not here apparently and we will note their appearances later. Mr. Ira Rowell, Attorney for the Commission, and Mr. Joseph Hunter of the technical staff, are appearing for the Commission.

With the understanding there will be no proceedings here this morning with respect to the first case, 4244, we will proceed, unless those representing the other toll bridge companies have some comment to make at this time. If not, we will proceed with the hearing on Case 4259.

Mr. Rowell: I wanted to make this suggestion, that the record show that the case is taken off the calendar until further notice, if that meets with the Commission's desire.

Mr. Thelen: Before the order is made I think I would like to make a brief statement in behalf of the American Toll Bridge Company. I should like to point out that the American Toll Bridge Company owns and operates two [fol. 350] toll bridges, one known as the Carquinez Bridge and the other known as the Antioch Bridge, and also, through a subsidiary, owns and operates what is known as the Martinez-Benicia Ferry. The franchises for both of these bridges were granted early in 1923 and in each case the franchise runs for 25 years, that is, until 1948, and each franchise provides, at the termination of the franchise, the property of the bridge shall revert to the adjacent counties without charge. I am making this statement because of the possibility that, under the order whichthe Commissioner has in mind, this proceeding may be limited to one of the bridges and I desire very respectfully to point out why we believe that, as a matter of equity and fairness, as far as we are concerned, the American Toll Bridge Company, consideration should be given to both the bridges.

Both of these bridges, if the Commissioner pleases, were financed and constructed and they are both owned and operated by the same Company, that is, the American Toll Bridge Company. They both cross the same water barrier, that is, the Carquinez Straits and the San Joaquin River, at points which are only about 25 miles apart. As far as the ferry is concerned, it operates across Carquinez Straits at a point about 8 miles east of the Carquinez Bridge. I wish to point out both of these bridges serve substantially the same territory, that is, the San Francisco Bay territory on the south, and on the north the Sacramento Valley, the Counties of Sonoma, Solano, Napa and Lake. Although there is certain traffic which is peculiar to one or the other of these two bridges, yet in the large sense and as far as the major traffic is concerned, those [fol. 351] bridges are both competitive.

It is well known that the operations of the Antioch Bridge have been less satisfactory financially than the operations of the Carquinez Bridge. But if the rates of the Carquinez Bridge are considered alone without regard to the earnings of the combined system, we think it is inevitable that an injustice will be done to the Company and to the service which it renders. We are quite certain that a comprehensive study of the facts will show that fairness and equity require consideration of the rates and earnings of the entire properties of the American Toll Bridge Company, rather than one bridge separately.

And it seems to us that the Commission must have had that situation in mind when it initiated the original inquiry in Case 4244, which inquiry was addressed to the corporations and not to a separate bridge. In other words, the inquiry in that case was addressed to the American Toll Bridge Company and not limited to one or the other of the particular bridges which are operated by that Company.

The course which I am suggesting is one which I believe the decisions of the Commission in the past will show to be entirely proper and just, because it has been always the policy of the Commission, as I have understood it, in matters of this kind to consider not mere parts or portions of a system but to consider the entire system. Your Honor is, of course, familiar with the Commission's practice as to electric rates. It has aways been, as I understand it, the Commission's policy in connection with electric rates to consider the rates of an entire system, not taking out just [fol. 352] the fat on the one hand and the lean on the other, but considering the two together. And for that reason, as I understand it, the electric rates for the city areas have been fixed somewhat higher than they would have been fixed had those areas been considered alone. And the purpose was, of course, to take care of the agricultural situation, the lean territory, which needed assistance from what we might call the fat territory.

That same principle has been applied in natural gas rate cases. For instance, take the famour Pacific Gas natural gas case, which was decided by Commissioner Seavey in November of 1933, reported in the 39th C. R. C. at 49, in that case the Commission considered at some length the question as to whether they would continue the policy which they had adopted in the past of correlating the city with the urban territory, that is, the fat with the

lean, and the Commission in the decision when written by Commissioner Seavey said,

"It will be the endeavor to make all adjustments in the spread of rates which the record indicates are equitable but no change in the general policy heretofore adopted will be recommended."

So that the Commission in that case and in subsequent cases continued the general policy to which I have referred.

Another interesting case came to the Commission from San Diego, involving the San Diego Consolidated Gas & Electric Company. In that case in the decision written in 1932 by Commissioners Seavey and Carr the Commission provided for higher rates for the electric properties than [fol. 353] would have been allowed if those properties were considered alone but they were considering the entire business, including the less profitable natural gas business, and for that reason they fixed somewhat higher rates for electric properties than would have otherwise been the case, in order to carry the gas properties.

And, of course, the Commission is familiar with the fact that, so far as the telephone company is concerned, the more populous exchanges have always had rates somewhat higher than would be the case if they were considered alone, the purpose being to help carry the lean exchanges

which are in the less thickly populated territory.

In our case our two bridges, we think, come clearly within that rule. We serve the same territory, they are competitive with one another, they are owned and operated by the same company, were financed by the same company, constructed by the same company and we think it clearly a case in which it would be proper for the Commission to apply the rule which is applied to these other utilities.

We, of course, do not desire in any way to interfere with whatever plans the Commission may have as to Case No. 4244 as far as the other toll bridge companies are concerned; but as far as we are concerned, the American Toll Bridge Company, we believe it only proper that these two bridges be considered together. And for that reason we respectfully submit a motion to the effect that, in so far as the American Toll Bridge Company is concerned, Cases 4244 and 4259 be consolidated for hearing and decision.

Mr. Rowell: May I make a brief statement, Mr. Commissioner?

[for 354] Commissioner Riley: Yes, Mr. Rowell.

Mr. Rowell: When on August 27th the amendment to. the Public Utilities Act became effective which placed jurisdiction in this Commission over toll bridges, the Commission instituted its investigation making all the companies respondents. I suppose the Commission and its staff. will proceed to make studies with respect to all of these bridges: but when, according to my information, they first prepared some information with respect to the Carquinez Bridge, the Commission thought it proper to institute a special investigation in that matter, making the American Toll Bridge Company the respondent in that case. And although I think the Commission should entertain the motion, that is, take it under submission, the motion made by Mr. Thelen, I see no reason why we can not proceed with the instant proceeding and introduce evidence in respect to the Carquinez Bridge particularly and, of course, the parties will not be stopped in putting in any evidence involving the other bridges in so far as relevant.

M:. Thelen: We on our part certainly do not want any delay. I am entirely in accord with Mr. Rowell's suggestion that the Commission proceed, taking this motion under advisement and ruling on it whenever the Commis-

sion thinks it proper.

Commissioner Riley: Without attempting to pass on the legal questions involved, the fact remains the Commission through its staff has made certain investigations with respect to the Carquinez Bridge and we desire to go forward at this time with those reports.

[fol. 355] Mr. Thelen: That is perfectly satisfactory.

Commissioner Riley: And with that understanding the motion will be entertained for later consideration.

F. Coleman, a witness called on behalf of the Commission, being first duly sworn, testified as follows:

Direct examination.

Mr. Rowell: What position do you occupy?

A. I am employed on the Commission's Department of Finance and Accounts.

Q. Will you explain briefly how long you have held that

position and the general nature of your work?

A. I have held that position for some 15 years. It has been my duty primarily to work in connection with the financial aspects of proceedings before the Commission. That involves analysis and study of applications for permission to issue securities, involves certain rate cases, particularly cost of money features, and it involves the investigation and auditing of records of the utilities.

Q. Have you made any study of the operations of the

Carquinez Toll Bridge Company?

A. Mr. Dunford, of the Commission's Transportation Division, and I made an investigation of the Commission's records at its office, for the primary purpose of determining the recorded costs of construction and operation.

Q. Have you prepared that material in the form of a

proposed exhibit?

A. Yes, I have.

Q. Will you please hand the original to the Commissioner?

A. I would like to point out on the face of that-

[fol. 356] Commissioner Riley: Had we better introduce this at this time or later?

Mr. Rowell: I ask to have it introduced as Exhibit No. 1,

subject to any objection that may be made.

The Witness: I would like to point out that the case number on there should be changed to the case number for this particular bridge, 4259. It says 4244.

Mr. Rowell: If that correction may be made on the face

of the exhibit, the copies will show the correction.

Commissioner Riley: That will be noted.

(Here foll ws Exhibit No. 1—pages 1 to 22 (down to words "The income and " "), inclusive, and also page 25 and page 26 (lines 1 and 2):)

[fol. 357]

EXHIBIT No. 1-C. R. C.

Witness: F. Coleman

Case No. 4259-Corrected Case

Investigation of the American Toll Bridge Company

Historical Summary—Cost of Financing—Assets and Liabilities—Revenues and Expenses

Railroad Commission of the State of California

Department of Finance and Accounts

San Francisco, California

[fol. 358]

October 19, 1937.

American Toll Bridge Company

Historical Summary:

American Toll Bridge Company was organized under the laws of the State of Delaware on or about May 28, 1923 with an authorized capital stock of \$5,000,000 divided into 5,000,000 shares of the par value of \$1.00 each, all common.

It appears that the corporation was organized by those in control of the affairs of Rodeo-Vallejo Ferry Company for the express purpose of constructing and operating a toll bridge across the Carquinez Straits between a point near Crockett in Contra Costa County, and a point near Vallejo, Solano County, and a toll bridge across the San Joaquin River from a point near Antioch, Contra Costa County, and Sacramento County. The former bridge is known as the Carquinez Bridge and the latter as the Antioch Bridge. They will be so referred to in this report.

On February 5, 1923-a twenty-five year franchise was granted by the Board of Supervisors of the County of

<sup>&</sup>lt;sup>1</sup> Rodeo Vallejo Ferry Company operated ferry boats between Shortway, near Valona, Contra Costa County, and Morrow Cove, Solano County.

Contra Costa to the Rodeo-Vallejo Ferry Company providing for the construction and operation of the Carquinez Bridge. On June 4, 1923 a twenty-five year franchise was granted by the Board of Supervisors of the County of [fol. 359] Contra Costa to Delta Bridge Corporation 2 providing for the construction and operation of the Antioch Bridge. The rights to construct and operate the bridges shortly thereafter were assigned to American Toll Bridge Company.

Construction work started on the Carquinez Bridge during April 1923 and on the Antioch Bridge during March 1924. The Antioch Bridge was opened to traffic on January 1, 1926 with temporary approach roads which were not completed until July 1927. The Carquinez Bridge was opened to traffic on May 21, 1927 with a temporary fender system at the base of the center pier. The permanent fender was completed during December 1930.

On July 2, 1923 the bridge company acquired ninety per cent of the total outstanding capital stock of Rodeo-Vallejo Ferry Company, through the issue of its own stock, and during the following months purchased for cash the remaining ten per cent. This company at present owns certain water front lands and other real estate and improvements.

During 1928 the bridge company purchased for \$137,725 all the outstanding stock (\$39,350 par value) of Martinez-Benicia Ferry and Transportation Company.

# Control of American Toll Bridge Company:

American Toll Bridge Company, the operator of the two bridges, since its organization has been controlled through [fol. 360] stock ownership by American Toll Bridge Company of California.

The latter company was organized under the laws of the State of Delaware on or about May 28, 1923 with an authorized capital stock of 750,000 shares of Class "A" non-vot-

<sup>&</sup>lt;sup>2</sup> Delta Bridge Corporation was organized under the laws of the State of California on or about December 21, 1922. Its outstanding stock (\$500 par value) was acquired on July 2, 1923 by American Toll Bridge Company.

ing stock of the par value of \$1 a share and 10,000 shares of Class B voting stock of no par value.

At the outset this company received all the authorized capital stock (\$5,000,000 par value) of American Toll Bridge Company, the operating company, except \$1,000 issued to incorporators, in exchange for stock of Rodeo-Vallejo Ferry Company and Delta Bridge Corporation it then held and certain real estate contracts and franchise. Thereafter it donated back to the operating company certain of these shares and sold other shares, all as hereinafter set forth. At present it is the owner of \$1,530,038 of the operating company's stock (of which \$3,719,593 now is outstanding) or approximately 41.13 per cent of the total amount.

The holding company issued its authorized shares of stock principally to the then holders of the stock of Rodeo-Vallejo Ferry Company and in payment for certain lands and rights. It appears that the 10,000 shares of Class B voting stock were issued in equal amounts to Aven J. Hanford and Oscar Klatt, the president and secretary respectively, of the ferry company. Subsequently, American Toll Bridge Company, the operating company, acquired Mr. Klatt's holdings, leaving now outstanding in the hands of the public, 5,000 shares of voting stock.

All of this voting stock of the holding company (5,000 shares) is said to be held by Mrs. Audrey V. Heck, the widow of Aven J. Hanford.

# [fol. 361] Method of Financing Cost of Properties:

American Toll Bridge Company has financed the cost of its properties through the issue, for the consideration hereafter shown, of the \$5,000,000 of stock, \$4,500,000 of first mortgage 7 per cent bonds and \$2,000,000 of second mortgage 8 per cent bonds, through the use of moneys obtained from Rodeo-Vallejo Ferry Company and through the investment of surplus earnings and moneys represented by its reserves.

From time to time the company acquired certain shares of the stock and paid and retired bonds. Up to the middle of 1935 it had reduced its outstanding stock to \$3,719,593 and its outstanding 7 per cent and 8 per cent bonds to

\$4,180,000. During 1935 it refunded its bonds and issued \$4,300,000 of first mortgage five and one half per cent bonds. This new issue has since been reduced to \$3,544,000.

## Balance Sheet as of August 31, 1937:

The books of the American Toll Bridge Company show, as of August 31, 1937, assets and liabilities as follows:

[fol. 362]

Property:

	•

Troperty.		
Carquines Bridge	\$7,863,151.17	
Antioch Bridge.	1,734,477.02	
Paul Fetate		
Real Estate	194,950.04	
Franchise	1.00	
Furniture and fixtures	24,353.32	\$9,816,932.55
Investments:		
Stock-Martinez Benicia Ferry	\$137,725.00	
Amer. Toll Bridge Co. of California.	326.459.57	
		004 104 57
Rodeo-Vallejo Ferry	500,000.00	964, 184. 57
Special Deposits:		
Retirement fund—1st 54s	\$44,000.00	
Interest fund—1st 54s	21,780.00	
Redemption fund—1st 7s	2,452.50	68,232.50
redemperon rund—15t 75	2,402.00	00,202.00
Current Assets:		7
Cash in bank	\$410,922.79	
Petty cash	1,525.00	
Wm. F. Morrish, Agent	42,197.74	
Accounts receivable	30,492.77	
Notes receivable		405 190 90
Notes receivable	1.00	485,139.30
Prepaid Expenses:		
Insurance	\$68,064.81	
Taxes	80,949,63	149.014.44
AdaCo	00,343,00	149,014.44
Treasury Securities:		
Bonds—1st 5 s par value	\$56,000.00	
Stock—Par value	1.280,407.00	1,336,407.00
	1,200,101.00	71,000,201.00
Deferred Debits:		
Unamortized bond discount and		
expense:		
Old issues	\$334.847.14	
18t-54s		
	140,152.22	FF1 005 00
Premium on called bonds	96,086.03	571,085.39
Total assets		\$13,390,995.75
		,,

fol.	500.0	9	
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	\$13,390,995.75
	2,087.25 16,902.50 8,392.19 50.00 22,196.86 62,158.52 31,000.00 48,017.02 2,689.714.25 616,852.41 15,735.86 57,280.00 66.74 55.95 20,000.00 33,111.71 .25 225,846.49 29,050.18

# [fol. 364] Carquinez Bridge Cost:

The company's balance sheet shows its reported investment in the Carquinez Bridge as of August 31, 1937 at \$7,863,151.17.

In arriving at this figure it has deducted \$300 representing interest received by it from Duncanson-Harrelson Company which would seem to be an income credit. Adding the figure back results in an adjusted book figure of

owing:		\$5,137,779.51
ender system		597,366.28
abor and equipment		14,039.60
Approaches		25,120.70
Buildings	***********	28,553.53
Tug "Escort"Pile Driver "Haveside"		4,951.97 6,994.94
Schooner "Bangor"	**********	1.750.00
Organisation expense.		476,707.70
Engineering overhead equipment	\$22,561.95	410,101.10
Office equipment		
automobile	724.67	
salaries and expenses	352,165,93	
office salaries	13,478.75	
damage claims	124.50	390,076.11
General overhead:		
office salaries	\$104.471.37	
office supplies and expense	30,717.38	
special services		
legal fees		
directors' fees		
miscellaneous	38,209.18	
taxes and licenses	17,690.62	
insurance		
interest and amortisation	688,092.56	
depreciation furniture		
advertising		
rent during construction		
charged to operation—Credit.		1,180,110.83
ctunged to operation—Credit	(01,002.01)	1,100,110.00
Total for Carquines Bridge		\$7.863,451.17
		,,
The company on its books has	recorded again	nst the Car-
quinez Bridge a depreciation re-		

The payments to contractors, included in the ledger balances in the amount of \$5,137,779.51, are made up of the following:

following:	
T. C. McGill-excavation and approach	\$11,295.92
E. J. Soule—steel	27,316.62
Duncanson-Harrelson Cofoundation work	
and paving	763,908.14
Raymond Concrete Pile Co.—Foundation	110,023.52
Blake Bros.—aggregate	47,719.28
Missouri Valley Bridge & Iron Cofounda-	
tions	1,417,660,15
Daniels Construction Co.—aggregate	33,639.49
U. S. Steel Products Co.—superstructure	
Healy-Tibbetts Co.—Riprap	39,361.92
Total -	\$5,137,779,51

To the Raymond Concrete Pile Co. was paid \$60,023.52 during 1923. Thereafter its work was discontinued and suit was brought against the company for breach of contract which was settled by the payment by the company during 1928 of an additional sum of \$50,000. which now is included in the cost of construction.

## Buildings:

Included in the cost of the Carquinez Bridge is an item of \$28,553.53 for buildings. Analysis of the account shows expenditures for the following structures:

Toll house and garage	\$17,092.77
Carquinez Inn and Comfort Station	2,659.86
Miller & McKinney Houses, etc.	8,800.90

Total \$28,553.53

The Miller and McKinney houses are rented for dwelling purposes and the revenue therefrom, together with the revenue from the Inn adjacent to the toll house, is treated as miscellaneous income.

The general offices of the corporation are located at the toll house but no part of the cost of construction is allocated [fol. 366] on the books to the Antioch Bridge.

# Floating Equipment:

The books of the company show an investment during the construction period of \$20,946.91 in the Tug "Escort" and the Pile Driver "Haveside".

During 1933 the tug was sold for \$4,000. and the pile driver for \$5,000. and these two amounts were credited to the capital accounts, leaving a balance still remaining on the books of \$4,951.97 for the "Escort" and \$6,994.94 for the "Haveside" although these two pieces of floating equipment no longer are owned.

# Organization Expenses:

These items of expense are included in the cost of the Carquinez Bridge in the amount of \$476,707.70, being carried on the books in an account styled "Construction Overhead" along with the general construction overhead expenditures.

The company set up total organization expenses in the amount of \$405,987.85 and commissions for the sale of stock in the amount of \$184,274.53, the two items aggregating

\$590,262.38. During 1927 the amount was apportioned on the books between the two bridges, \$476,707.70, or 80.762 per cent., going to the Carquinez Bridge, and \$113,554.68, or 19.238 per cent. to the Antioch Bridge.

The total organization expenses are made up of the fol-

lowing items:

[fol. 367]	Total	Charged to Antioch Bridge	Charged to Carquinez Bridge
O. H. Klatt (No detail available)	\$20,235.15	\$3.892.84	\$16,342.31
Legal fees and expenses	117,279.52	22,562.23	94,717.29
Auditing fees and expenses	7,504.50	1,443.72	6,060.78
Other fees and expenses	937.50	180.36	757.14
Cost of opening celebrations	15,926.19	3,063.88	12,862.31
· Antioch \$4,409.39	,		,
Carquinez 11,516.80			
Expenses for stock issues:			· W
Taxes, licenses, stamps	4.541.00	873.60	3.667.40
Stock pooling expense	2,619.93	504.02	2,115,91
Advertising stock sales	13,674.26	2.630.65	11.043.61
Commissions paid	184,274.53	35,450.73	148,823,80
Expenses (No detail available)	223,269.80	42,952.65	180,317.15
Total	\$590,262.38	\$113,554.68	\$476,707.70
		19.238%	80.762%

As to the items of \$20,235.15 apparently representing expenditures made by Mr. Oscar H. Klatt, one of the officers and organizer of the company, and of \$223,269.80, said to consist of expenses incurred in selling \$119,609.00 of stock and incurred by Mr. Klatt for organization, no supporting explanation or details were located. These amounts, or part of them, were possibly expended by Rodeo-Vallejo Ferry Company, whose records in this connection were not available.

The stock pooling expense of \$2,619.93 represents costs of signing up stockholders in a pooling or voting trust arrangement.

## Legal Fees and Expenses:

Legal fees and expenses are included in organization expenses in the amount of \$117,279.52 and in general overheads in the amount of \$263,985.66, making a total in capital accounts of \$381,265.18. Of this amount \$300,340.95 is included in the cost of the Carquinez Bridge and \$80,924.23 is included in the cost of the Antioch Bridge.

### [fol. 368] Office Salaries:

These are included in the cost of the Carquinez Bridge in the amount of \$104,476.37.

The expenditures consist of amounts paid officers and employees of the bridge company and include the following:

Prior to 1925. \$53,969.27 Less—Charged to Antioch. 11,448.50	\$42,520.77
During 1926.  During 1927 (January to May).	41,863.75 20,086.85
Total	\$104,471.37

#### Special Services:

These items include \$104,000 representing 65,000 shares of stock issued at \$1.60 a share, which were delivered to Robert L. Dunn in settlement of a claim by him for services rendered in connection with the company's bond financing in 1925. The remaining items in general represent expenditures incurred in obtaining the stockholders' agreement to join in a voting trust arrangement.

### Antioch Bridge-Cost:

The balance sheet shows the company's reported investment in the Antioch Bridge as of August 31, 1927, at \$1,734,477.02. This figure is made up of the following:

Payments to contractors:		
Bay Construction Company	<b>\$36,461.23</b>	
Little, Dodge & Reynolds	124,999.40	
Dyer Bros	325,996.77	
Blake Bros	46,508.04	
Daniels Construction Co	15,810.25	
Duncan-Harrelson Co	709,736.62	\$1,319,512.31
Cement		53,287.39
Labor and equipment		15,075.93
Buildings		1,169.49
Land		1,500.00
Organization.		113,554.68
Engineering salaries, supplies and expenses		40,424.90
Six-Minute Ferry		* 50,000.00
[fol. 369] General Overhead:		
Office salaries	\$11,448.50	•
Office supplies and expense	4,123.62	
Special services	24,811.24	
Legal fees	57,227.81	
Directors' fees	1,718.25	
Miscellaneous,	8,486.95	**
Taxes and licenses	1,981.56	
Insurance	930.82	
Interest and amortization	28,790.51	*
Depreciation—furniture	239.87	
Advertising	168.19	
Rent during construction	25.00	\$139,952.32
Total for Antical Bridge		\$1 734 477 02

The \$50,000 item included for the Six-minute Ferry is said to represent an expenditure made in acquiring the franchise of a competing ferry line which was immediately discontinued.

#### . Real Estate:

On July 2, 1923 the company acquired from American Toll Bridge Company of California 55 acres of land in Solano County and 1 acre near Antioch in Contra Costa County which it entered on its books at a total cost of \$1,500,000. On May 23, 1935 it adjusted this figure to \$137,896.83 to reflect an appraised value as of January 2, 1925 determined by the American Appraisal Company. The write-down was charged to "Capital surplus".

As of May 31, 1935 the company created a reserve to amortize this \$137,896.83 figure. Such reserve is being accumulated on the six per cent sinking fund basis over the life of the company's franchise by charges to operating expenses. The total in the reserve on August 31, 1937 was \$48,017.02.

Since the original acquisition the company has expended \$57,053,21 for additional lands and rights of way bringing the total book figure up to \$194,950.04.

# [fol. 370] Advances for Rodeo-Vallejo Ferry Company:

The company's books show an indebtedness of \$597,573.09 due Rodeo-Vallejo Ferry Company, its wholly owned subsidiary.

Of this amount \$292,000 was incurred in October 1925 through the purchase by the bridge company of \$182,500 par value of its own stock at \$1.60 a share. As to the balance it appears that during the construction period the bridge company was advanced approximately \$325,000 by the ferry company for construction purposes. Subsequently, the amount has been reduced by expenditures made by the bridge company for the account of the ferry company.

The balance now unpaid of \$597,573.09 carries no inter-

## Capital Stock:

The company at the outset as stated above, issued all of its authorized capital stock in exchange for stocks and prop-

erties. The journal entries reflecting the issue are of interest and are given below:

923, May 28: Subscribers Capital stock (To incorporators)	\$1,000	\$1,000
July 2—Rodeo-Vallejo Ferry Co. stock	\$2,499,500	
2740 * common Delta Bridge Co. stock	500	*
5 shs. Real estate	1.500.000	
55 acres Solano 1 acre Antioch		
Franchise Delte Bridge Co	1,250,000 5,000,000	**
Golden Gate Ferry Co. Rodeo-Vaijejo Ferry Co.		
Capital stock Initial surplus	**********	\$4,999,000 5,251,000

(To record the acquisition of sundry assets from the American Toll Bridge Company of California for the issuance of all the remaining capital stock of this corporation in accordance with the minutes of a directors' meeting held May 29th, 1923. The assets acquired are in the opinion [fol. 371] of the Board of Directors, worth the values stated in view of the prospective earnings to be realized therefrom which when realized will yield a return of over 12% on the outstanding capital stock.)

Subsequently the company wrote down the values assigned in the foregoing journal entry, to the following:

Real Estate		\$500,000.00 137,896,83- 1.00
Total	 	\$637,597.83

# Subsequent Transactions in Stock:

It appears that American Toll Bridge Company of California in receiving the capital stock of the operating company, as set forth in the preceding paragraphs, agreed to donate \$1,000,000 of such stock back to the operating company and in addition to sell \$1,500,000 of stock and to donate the receipts to the operating company. The \$1,000,000 of stock thus to be reacquired by the operating company was to be offered for sale by it at \$2.00 a share.

The original plans, then, called for a total stock issue by the operating company of \$5,000,000 of which \$2,500,000 was to have been held by the holding company and \$2,500,000 by

the public.

From time to time, however, this plan was modified. The holding company donated back to the operating company \$1,993,043 of the operating company's stock and in addition turned over to it \$69,475 of such stock which had been purchased by it with cash advanced by the operating company. The operating company was not successful in disposing of all its reacquired stock. An analysis of its treasury stock account indicates the following transaction having taken place:

[fol. 372]		
Originally issued		\$5,000,000
Reacquired from holding company:		
—by Donation	. \$1.993.043	
-by cancellation of accounts		
Resequired from Rodeo-Vallejo Ferry Compan		
at \$1.60 a share—a total price of \$292,000	182,500	* * *
· atual	****	*
Sub-total	\$2.245,018	***
Re-issues of stock:		
Sales less cancellation and adjustments		
Delivered to bond underwriters as bonus Delivered to R. L. Dunn in settlement of law		
suit	65,000(5)	
		•
Sub-Total	\$964,611	
- Balance		1.280.407
Dainace		1,250,401
Outstanding Aug. 31, 1937		\$3,719,593
	7 4	

(3) Of this amount \$28,471.75 was credited to amounts receivable from the holding company and \$41,003.25 was credited to "Initial surplus".
 (4) This stock was recorded as reissued at \$1.60 a share, a total of \$800.000.

and was charged to bond discount and expense in that amount.

(5) This stock likewise was recorded at \$1.60 a share, a total of \$104.000.

and was charged to construction overhead in that amount.

The records indicate that through these reissues of stock, the bridge company received cash and subscriptions of \$795,743.81 and paid certain stock selling expenses of \$10,126.50, a total of \$805,870.31. At the same time it incurred indebtedness in the re-purchase of its stock in the amount of \$292,000 and charged off amounts receivable of \$28,471.75, a total of \$320,471.75. The difference between these two totals is \$485,398.56.

During the period of construction the holding company, on behalf of the operating company, sold shares of stock netting at \$1.60 a share, \$654,163.20, delivered 153,125 shares

in payment of legal fees of \$245,000, 139,062 shares in payment of \$222,499.20 due contractors, 10,000 shares in payment of stock sales advertising expenses of \$16,000 and paid [fol. 373] stock selling and other expense of \$228,269.80. In summary form, then, the company received in its stock financing:

Stock and assets-book figure	\$637,897.83
Net proceeds—sale of treasury stock	485,398.56
Proceeds-sale by holding company	654.163.20
Contractor's fees paid	222,499.20
Stock selling expenses and advertising	244,269.80
Legal fees	245,000.00
	*
Sub-total	. \$2,589,228.59
Settlement of claims	104,000.00
Bonus to underwriters.	800,000,00
.*.	,
Total	\$3,493.228.59

#### Issue of Bonds:

It appears that during December 1925 the company sold, at 90, the \$4,500,000 of first mortgage seven per cent bonds and \$2,000,000 of second mortgage eight per cent bonds, both issues being dated as of April 1, 1925 and maturing on April 1, 1945.

At the time of issue the company charged to unamortized discount and expense the following:

First	mortgage	bonds-

	Stock issued to underwriters as bonus—250,- 000 shares at \$1.60	\$400,000
	Discount Expenses	450.000 9,750
	Total	•
90	ond mortgage bonds— Stock issued to underwriters as bonus—250,-	
	000 -14 41 60'	# 100 0g0

*	ooo sna	iles at	\$1.00			\$400.000
	Discount					200,000
	Expense		· indian			14,103
				* ""	2	

Ti-4-1			\$614,103
Total	 	 	\$014,100

[fol. 374] Considering the discount and expense in these amounts, the cost to the company of the money derived through the issue of its bonds would approximate 9.42 per cent. This percentage was determined as follows:

Item	Eirst Mtge Bonds	Second Mtge Bonds	Total
Face amount		\$2,000,000 214,103	\$6,500,000 673,853
Net Proceeds	\$4,040,250	\$1,785,897	\$5,826,147
Annual Charges:			
Interest Amortization Amortization of bonus stock:	\$315,000 22,987	\$160,000 10,705	\$475,000. 33.692
\$800,000 book figure	20.000	20.000	- 40,000
Total	\$357.987	\$190.705	\$548.692
Ratio—Total charges: to net proceeds.	8.86%	10.68%	9.42%

There are included in capital accounts on the books of the company certain sums aggregating \$116,639 (6) which might properly be considered as bond expense. If these are so considered and amortized accordingly, the average cost would be increased to 9.71 per cent.

In the foregoing tabulation the discount and expense is amortized on the straight line basis. If amortized on the six per cent sinking fund basis, and the bonus stock disregarded, the average cost would be reduced to approximately 8.60%.

#### [fol. 375] Re-Financing of Bonds:

As of August 1, 1935 American Toll Bridge Company issued and sold at 96½ per cent of face value plus accrued interest a new issue of first mortgage 5½ per cent bonds due as follows:

Series A	\$350,000 on August 1, 1936.
Series B	350,000 on August 1, 1937.
Series C	400,000 on August 1, 1938.
Series D	3,200,000 on August 1, 1945.
	1

Total	 	\$4,300,000

(6)	Special services-R. L. D.	unn	 \$107,000.00
	Trustees fees		 8,043.66
	Expenses		 595.80
	Legal—Rogers & Bray	i mijajaa	1,000.00

The proceeds realized, together with cash on hand, were used to pay the then outstanding 7% and 8% bonds aggregating \$4.180,500, premiums upon calling said bonds amounting to \$131,300 and expenses incident to the new issue aggregating \$43,527.70. The discount suffered in the sale of the 512% bonds aggregated \$150,500, making total discount and expense to be amortized over the life of the new bonds of \$194.027.70.

# Cost of Money:

It appears that the average cost to the company of money, obtained through the issue of its bonds now outstanding and represented by its reserves which are accumulated on the sinking fund basis, is 6.18%.

The following tabulation shows how this percentage was

obtained:

400
-
-
~~
0.0
_
* Service

					V	Annual Charges	7.	Effective
	Amount .	Discount	Expense	Proceeds	Interest	Amort-	Total	Interest Rate
Bonds (A)	\$350,900	\$12,250	(3)	\$334,207	. "	\$15.795	\$35,043	10.48%
Series A.	350,000	12,250	3,543	334, 207	-	7,896	27,146	8.12%
Series D.	3,200,000	112,000	32,394	3,055,006	176	14,439	190,439	6.23%
Sub-Total	\$4,300,000	\$150,500	\$43,528	\$4,105,972	\$236,590	\$44,144	\$280,644	6.84%
Ser. A & B.	\$700,000	\$24,500	. 980,78	\$668,414	.838,500	\$23,689	\$62,189	9.30%
Balance	\$3,600,000	\$126,000	\$36,412.	\$3,437,558	\$198,000	\$20,455	\$218,455	6.35%
Reserves (C).	\$3,354,581			\$3,354,581	\$201,275		.\$201,275	6.00%
Total	\$6,954,581	\$126,000	\$36,442	\$6,792.139	\$399,275	\$20,455	.\$419,730	6.18%

A. Do not include \$2,000 of first mortgage 7% bonds outstanding but which have been called for payment.

B. The total expenses applicable to the entire issue for the purposes of this tabulation have been apportioned to each series on the basis.

Norms:

\$2,689,714 of the face amount of each series.

C. Includes only those reserves being accumulated on the 6% sinking fund method, namely:

Reserve for depreciation—Carquinez Bridge
6.16.8

Reserve for depreciation Antioch Bridge... Reserve for amortization of bridge lands.

616,852

[fol. 377] In the foregoing tabulation the discount and expense applicable to the bonds is amortized over the respective lives on the straight line basis. If amortized on the sinking fund basis the effective rate for the bonds now outstanding would be reduced to 6.24% and the average cost of money to 6.12%.

At the time the two old bond issues were called for payment there were balances on the books representing unamortized bond discount and expense in the total amount of \$440,521.88. The premiums necessary to call were reported at \$131,300, the two sums aggregating \$571.821.88. If this amount is amortized over the maximum life of the new bonds, the average cost of money would be increased to 7.02%, with amortization on the straight line basis, and to 6.75% on the sinking fund basis.

#### · Earnings:

15-704

During the entire period of the bridge operations from January 1, 1926 to August 31, 1937 the operating revenues have aggregated \$12,744,108.51, the operating expenses \$7,046,404.05 and the net operating revenue \$5,697,704.46. A combined income account for this period is as follows:

fol. 378

Carquinez Bridge:	
Operating revenue	
Operating expense 5.633.125.97	\$5 658 937 90
Antioch Bridge:	
Operating revenue : 31.452.044 64	
Operating expense 1:413.278 08	
	38:766.56
Total:	
Operating revenue	
Operating expense. 7.046.404.05	2. 00 mar. 0
Non-Operating Revenue	\$5.697.704.46 135.972.35
Gross Corporate Income	\$5.833.676.81
Deductions:	
· Interest and amortization of debt dis-	
count and expense	
Amortization of bond premiums 32,040,24 Corporation franchise tax 10,410,06	
Capital stock tax 3.077.00	
. Income tax	
Miscellaneous 146.50	24 000 050 10
	\$4.908,250.10
Net profit	\$925.426.71

[fol.379] A summary of the surplus account shows the following:

	Profit from operation	perations	366.610.14
	Sub-Total		\$1,667,075.62
	Deductions:		
	Taxes and expense adjustments Loss on sale of property	\$20,590.08 720.25	
	Bond discount adjustment	362,897.50	
	Reserve for bridge lands	37.505.57 557.280.00	
	Reserve for depreciation of furniture.  Capital surplus.	10,157.60 175,784.25	
*	Dividends	642,443.48	
	Settlement of law suit	3,000.00	
	Bad debts	12,190.26	
	Miscellaneous	1,602.15	4
/-	Total deductions		. 1.324.171.14
	Surplus—August 31, 1937.		\$342.904.48

During the life of the corporation, dividends have been paid as follows:

Year				Amount
1924			· / · · · · · ·	\$93,796.09
1925		4	/	57,653.90
1936				302,149.84
1937				188,843.65
	. *			
	Total			\$642,443.48

#### [fol. 380] Franchises:

The American Toll Bridge Company holds two franchises granted by the Board of Supervisors of Contra Costa County. One in contained in Ordinance No. 171 covering the Carquinez Bridge, the other is Ordinance No. 175 covering the Antioch bridge.

Ordinance No. 171 was adopted by the Board of Supervisors on February 5, 1923. It provides that it shall become effective thirty days after its passage. Ordinance No. 175 was adopted by the Board of Supervisors on June 4, 1923. It too provides that it shall become effective thirty days after its passage. Ordinance No. 171 granted a bridge franchise to Rodeo-Vallejo Ferry Company, its successors

and assigns, while Ordinance No. 175 granted a bridge tranchise to Delta Bridge Corporation, its successors and assigns. As stated, both franchises are now held by American Toll Bridge Company.

Both ordinances provide that the franchise granted by such ordinances is "for a term of twenty-five (25) years, from and after the effective date of the ordinance granting said franchise"

Both ordinance contain the following language:

"It is hereby ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the Counties of Contra Costa and Solano." (In case of Antioch bridge franchise, the title reverts to Counties of Contra Costa and Sacramento.)

Each ordinance provides that the grantee shall pay a license tax of \$100, per month payable annually, commencing from date of the operation of the bridges. In addition they shall pay 2% of the gross receipts derived from the use and operation of the bridges for the benefit of the Counties of Contra Costa and Solano in case of the Cartfol, 381] quinez bridge and the Counties of Contra Costa and Sacramento in case of the Antioch bridge.

[fol. 382] Mr. Rowell: Mr. Coleman, will you in your own words, describe the material which is here set forth in this Exhibit No. 1?

A. This is primarily a factual report. I attempted in the first two or three pages to give a brief summary of the history of the construction up there, the date when incorporated, the date when construction starfed and was completed, and also to point out the control of the company. There are two companies, as you know—the American Toll Bridge Company is the operating company and the American Toll Bridge Company of California occupies the position of a holding company. Since the inception of the operating company it has been controlled, through stock ownership, by the American Toll Bridge Company of California, through ownership of a substantial part of the outstanding stock. At present the operating company has outstanding and in the hands of the public \$3,719,593 par value

of stock, consisting of shares of \$1 par. Of that amount, \$1,530,036 shares are held by the operating company, or approximately 41 per cent. I am advised the remaining stock is widely distributed over many hundreds of stockholders.

STEWART MITCHELL, a witness called on behalf of the Commission, being first duly sworn, testified as follows:

#### Direct examination:

Mr. Rowell: Will you state your full name?

A. Stewart Mitchell.

Q. Are you now employed by the Railroad Commission?

A. I have been temporarily employed by the California Railroad Commission to assist in the work of obtaining data [fol. 383] with reference to the toll bridges, in accordance with the desire of the Department of Public Works to cooperate in this work, as it will undoubtedly be of benefit to them in their reports to the California Toll Bridge Authority.

Q. Are you permanently in the employ of the Department of Public Works?

A. Yes, sir.

Q. What position do you hold in that Department?

A. I have the grade of senior bridge engineer and in charge at the present time of maintenance and fixing load limits of existing bridges and special investigation work covering our design and construction work.

Mr. Rowell: I ask that this be introduced as Exhibit No. 3, Mr. Commissioner, subject to any objection.

Commissioner Riley: It will be noted as Exhibit No. 3 by the Commission.

(Here follows Exhibit No. 3—pages 1 to 4, inclusive, and 8 to 27, inclusive.)

[fol. 384]

#### EXHIBIT 3, BY COMMISSION

#### California Railroad Commission

Transportation Department, Engineering Division Study Dealing with Cost of Constructing Carquinez Bridge

Case No. 4259

San Francisco, California, October 23, 1937. Stewart Mitchell, Senior Bridge Engr., Division of Highways, Dept. of Public Works, State of California.

[fol. 385]

Sacramento, California, October 23, 1937.

#### Case No. 4259

Mr. J. G. Hunter, Transportation Engineer, California Railroad Commission, San Francisco, California:

Pursuant to an understanding reached between the Department of Public Works and the California Railroad Commission in connection with Case No. 4259, I have seen instructed to prepare a report covering an engineering analysis of the construction of the Carquinez Bridge as it exists today. The purpose of the report, which is attached hereto, is to assist in determining the reasonableness of the actual charges to physical property as shown on the books of the American Toll Bridge Company. In order to obtain a suitable standard by which to measure the reasonableness of the book costs, I have estimated the cost of construction based upon the assumption that sufficient finances were available from the beginning to permit the letting of all major items of work to contract by competitive bids.

The report includes the general outline of the history and progress of construction taken from information found in the company's records, amplified by statements of the company's officials and employees. These data show, in a general way, the reasons for some of the differences which exist between the estimated costs. as shown in this report, and the actual charges to property accounts, as shown in the com-

pany's books.

It is my opinion that based upon the program of construction assumed herein, the estimated allowances for construct-. ing the existing bridge represent the fair and reasonable cost of the physical structure. In preparing the estimate I have endeavored to employ all available engineering data which appeared to be in any way pertinent, tempered by my own experience and judgment.

Attention should here be called to the fact that the estimated construction cost does not include any allowance for land or property damage. It is understood that these fac-

tors will be taken care of in a later report.

Data upon which the estimated costs were based included that originally collected by the Bridge Department of the Division of Highways when preparing the "Report on Toll Bridges in California," for the State Legislature of 1929. This information has been supplemented since that time by data taken from various sources.

In presenting this report I desire to thank the staff of the California Railroad Commission, the Southern Pacific Company, and other members of the engineering staff of the Department of Public Works who have furnished or assisted in compiling data used in it. I also desire to express my appreciation of the cooperation offered by the management of the American Toll Bridge Company in being willing at all times to open its books and assist in obtaining desired information.

Stewart Mitchell, Senior Engineer, Division of Highways, Department of Public Works.

# [fol. 386] 1. General Facts Concerning the Bridge:

The Carquinez Bridge is one of the toll properties owned and operated by the American Toll Bridge Company which was incorporated under the laws of Delaware May 28, 1923. The bridge, located on U. S. Route No. 40, crosses the Carquinez Straits, joins Vallejo in Solano County with Valona and Crockett in Contra Costa County, and forms a link in the California State highway system. The American Toll Bridge Company is the owner of the franchise covering the operation of the bridge by virtue of its owning the entire stock of the Rodeo-Vallejo Ferry Company to whom the franchise was granted by Contra Cotsa County to be effective March 7, 1923, for a period of 25 years. This company also owns and operates the toll bridge over the San Joaquin River near Antioch by virtue of a franchise granted by Contra Costa County to the Delta Bridge Corporation and later

assigned to it. This franchise, effective July 4, 1923, is also for a period of 25 years. The American Toll Bridge Company on May 1, 1928, purchased the Martinez-Benicia Ferry Company and now operates that ferry along with the two bridges, thus controlling all highway crossings of the Carquinez Straits and lower San Joaquin River. The toll bridge company operates these two toll bridges as one property and apportions the general costs of administration, financing, and taxes between them approximately in proportion to their relative property accounts.

The bridge over Carquinez Straits is a steel structure consisting of two 1100-foot cantilever spans, two 500-foot anchor spans and 1132 feet of viaduct at the southerly end, [fol. 387] making a total length of bridge of 4482 feet. General dimensions and typical features of the bridge are shown in Plate No. 1 which is taken from an article by D. B. Steinman, Consulting Engineer in Engineering News-Record of May 12, 1927.

The bridge over the San Joaquin River near Antioch is located on a State highway and consists of one 320-foot steel lift span, one 320-foot through steel truss span, 2078 lineal feet of steel deck truss spans on steel towers and 1921 lineal feet of reinforced concrete pile trestle making the total length 4639 feet.

The Martinez-Benicia ferry joins the State highways which pass through those two termini and operates one boat with one other boat held in reserve. The ferry was purchased in 1928 for approximately \$138,000.

In addition to the bridges and ferries the toll bridge company owns certain lands, a large part of which are not necessary for the operation of the toll properties.

The following are sources of information for obtaining data relative to cost and earnings for the Carquinez Bridge and other properties of the American Toll Bridge Company.

- 1. Books, periodical summaries and engineers' diaries and records of the American Toll Bridge Company.
- 2. Audits by Haskins and Sells, San Francisco, Certified Public Accountants.
- . 3. Files of the Corporation Commissioner of the State of California.

- 4. Amendment to Registration Statement, filed July 8, 1935, with the Securities Exchange Commission. (In connection with refinancing funded debt.)
- 5. Federal Income Tax Collector's office, San Francisco, and income tax returns of the toll bridge company.

[fol. 388] 6. Records of Contra Costa County,

For purposes of orientation and reference, the following chronological statement of important events in connection with the history of the American Tol! Bridge Company is given:

Rodeo-Vallejo Ferry began operating July 4, 1918.

The Delta Bridge Corporation, original holder of the franchise for the Antioch Bridge incorporated under the laws of California, Dec. 21, 1922.

Twenty-five year franchise granted by Contra Costa County to Rodeo-Vallejo Ferry Company to construct and operate the Carquinez Bridge, Feb. 5, 1923.

Investigation and construction work started on the Car-

quinez Bridge Apr. 2, 1923.

The American Toll Bridge Company, owning and operating company and the American Toll Bridge Company of California, a stock holding company, incorporated under the laws of Delaware, May 28, 1923.

Twenty-five year franchise granted by Contra Costa

County to construct the Antioch Bridge, June 4, 1923.

Construction work started on the Antioch Bridge, March 1924.

American Toll Bridge Company bonds underwritten Apr. 1, 1925.

Antioch Bridge opened to traffic (temporary approach roads) Jan. 1, 1926.

Approach roads completed July 11: 1927.

Carquinez Bridge opened to traffic, with temporary feature system at center pier, May 21, 1927.

Martinez-Benicia Ferry purchased May 1, 1928. Permanent fender system completed Dec. 2, 1930.

# [fol. 389] 3. Construction History and Contracts:

The following historical data has been taken from the records of the toll bridge company. Application was made to the War Department on October 23, 1922, for a permit to build the bridge and the permit was granted April 7, 1923. Surveys and other work of a preliminary nature

were started April 2, 1923, and on July 20 of the same year a small contract for excavating and building approaches to the pier at the north end of the bridge was entered into. The franchise stipulated that construction work should start within four months after the time it was granted.

was granted:
On October 30, 1923, the toll bridge company employed the firm of Duncanson and Harrellson. San Francisco, on a 6% cost plus" basis to do foundation investigation work and to start the construction of some of the foundations. Surficient exploration work was done by November 15, 1923, to allow the design of the major piers and the superstructure to proceed and plans of the bridge were rushed to completion by January, 1924. In general, the work carried on by Duncanson and Harrellson covered the sonstruction of the southerly viaduct piers Nos. 9 and 12 inclusive the coffeedam, foundation pile driving and pouring of seal course for Pier No. 4 and construction of a caisson 100 use at Pier No. 3.

At this time, it appears from the records that construction work was being financed through stock sales, earnings of the Rodeo-Vallejo Ferry Company and probably the personal fortunes of the organizers of the toll bridge conspany.

Difficulties arose which interfered with the sale of stockand it was soon evident that additional finances would [fol. 390] have to be obtained if the bridge was to be completed and opened to traffic within a reasonable length of time. Officials of the toll bridge company have stated that considerable difficulty was encountered in borrowing money to complete the project and that mancial interests were hesitant to undertake its financing until the company had invested a considerable amount of its own mency and carried the work to a point which indicated its general feasibility. In April 1925, first and second morrgage bonds to the amount of \$6,500,000 were sold which made it pessible to let the remainder of the construction work to contract under conditions of competitive bidding to large and responsible contractors.

Reference is here made to the chart (Plate No. 2) which shows the progress of construction work on various major units of the bridge taken from the engineers' construction records. As has been stated, work up to April 1925, was generally carried on upon a force account basis and in-

cluded the completion of some of the viaduct footings on dry land at the southerly end of the bridge, the fabrication of two caissons for Pier No. 3 located in the deep water of the Straits; and, the placing of a cofferdam, excavating to the proper depth, driving the foundation piles and placing a concrete seal course at Pier No. 4. In constructing this pier, the base of which was 50 feet below the water surface, a cofferdam of untreated timber sheet pil-. ing was constructed. Likewise, untreated lumber was used in the outer walls of the caissons to be sunk into place at Pier No. 3. It will be noted that this work stopped along in December 1924, and remained at a standstill for about six months until the bonds were underwritten and the Mis-[fol. 391] souri Valley Bridge and Iron Company (who. took the contract to complete the foundation work in May. 1925) started active operations.

Due to this enforced delay which it is understood was 'caused by lack of finances, teredo had time to work on the untreated timber of the cofferdam erected at Pier No. 4 and practically destroyed its usefulness. The Missouri Valley Bridge Company apparently tried to complete the pier by only partially reconstructing and repairing the existing cofferdam but were unable to make it watertight. They were finally forced to drive an entirely new wall of sheet piling. remove the old and fill in between with additional concrete seal. The cost of constructing the original cofferdam wall. the attempt to repair it and its removal and replacement with additional congrete seal must be considered abnormal and the result of financial or other conditions beyond proper engineering control: The records of the company show that an estimate of \$125,000 to repair the damage to this pier was made at the time the Missouri Valley Bridge Company started operations. It is understood, also, that due to the delay in placing and sinking the caissons, shrinkage of the timber caused considerable difficulty from leakage and such extra cost must be attributed to the conditions connected with financing the work. .

Table No. I which follows, lists contracts let in connection with the construction of the bridge. It will be noted that the list includes a contract with the Raymond Concrete Pile Company, which covered the construction of the foundations and that this contract was entered into previous to the arrangements being made for financing the [fol. 392] remaining construction work. It is understood

the work was sub-let by them to the Missouri Valley Bridge ('ompany but later (April, 1925) the contract was abrogated and the work let directly to that company. The books show a payment to the Raymond Concrete Pile Company of \$50,000 in settlement of a claim or suit resulting from this contract. It appears that the obtaining of sufficient finances to complete the project made it beneficial to the tell bridge company to re-let this work.

In November, 1925, a contract was let to the United States Steel Products Company for furnishing and erecting the steel superstructure of the bridge and Duncanson and Harrellson were awarded a contract in March, 1927, for placing the concrete floor over the structure. These contracts were

all on a "lump suni" basis.

Piers Nos. 2, 3a and 3b are located in the deep channel of Carquinez Straits where the current is swift and, due to its scouring action, the water is deep with comparatively shallow overburden over the rock or other hard material upon which these piers are founded. The piers being relatively narrow in proportion to their height, received relatively little lateral support from the shallow depth of material surrounding them. A considerable amount of rock fill was placed around these piers by contract let to Healy-Tibbits Company previous to the opening of the bridge to traffic.

Piers No. 3a and 3b were in danger of being struck by boats travelling up and down the Straits and, with the approval of the War Department, a fender system consisting of four ships securely anchored in suitable positions was installed. This work was done about the time the [fol. 393] bridge was opened to traffic. Opposition of shipping interests apparently caused the War Department to require a more extensive type of fender, and an elaborate? structure, plans of which are on file, was designed and built. Rock was placed around the piers to a level 54 feet below the water surface or some .70 feet above the base of the piers thus affording considerable lateral stability. this rock filling, concrete piles were driven which supported the concrete fender, the contract for the concrete work being let to Healy-Tibbits Company, August 29, 1929, and completed December 2, 1930.

The cost of this rock fill and fender was financed from the earnings obtained through operating the bridges owned by the company.

Carquinez Bridge

Contractors as shown on the books of the American Tell Bridge Company.  Contractor  McGill  McGill  Approaches to Fier No. 1  Excavation, Fier No. 1  Excavation, Fier No. 1  Exploration and pier foundations  Exploration and Fier #4)  Explorat	39,361	Farnish rock for fill at fender.
Contractors as shown on the books of the Contractor  Thes. C. McGill  Buneanson and Harrellson  Raymond Cenerete File Co  Exploration and pier foundations  (Co  Raymond Cenerete File Co  Raymond Cenerete File Co  Co  Councrete floor (road  E. L. Soyle Co  Contractore	Healy-Tibbite Co. Rock filling (riprap).	6.
Date 8/23 11/15/23 11/15/23 11/39/25 4/27/25 10/30/25 4/30/25 11/25 5/11/25 11/4/27	7/ 9/26	3/19/28 8/29/29

<sup>\*</sup> Includes \$43,286.80 for exploration work. \$50,000.00 paid in 1928 for settlement of suit

(Here follows 1 photolithograph; side folio 395.)

JEMAMJJASONDJE SURVEYS & EXPLORATION APPROACHES TOLL HOUSE, ETC. RIP-RAP TEMPORARY FENDER PIER NO. 1 Detail plans completed -PIER NO. 2-E PIER NO. 3A-E PIER NO. 3B-E PIER NO. 4 PIER NO. 5 PIERS NOS. 6-8 INC. STEEL-VIADUCT -CANTILEVER SPANS & TOWERS CONCRETE FLOOR

CONTRACTORS :-

CARQU

# QUINEZ BRIDGE PROGRESS SCHEDULE

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			an grow Co. String of Low	Sept Projects	Hedy - Takets Co.		



### [fol. 396] 4. Analysis of Construction Costs:.

As has been stated, all contracts for the construction of the Carquinez Bridge were let on a "cost plus" or a "lump sum" basis. No data is available segregating the total cost to major units or classes of work which comprise the bridge. In order to be able to form an opinion as to the reasonableness of the unsegregated book charges against construction work connected with the bridge, there has been prepared an estimated cost of constructing each of the major units of the bridge at prices in effect at the time of construction, but on the assumption that all the work had been let to responsible contracting firms through competitive bidding.

### a. Piers and Foundations:

In the construction of the substructure the major item is the cost of the deep water caissons for Piers No. 2, 3a and 3b. In estimating the cost of caissons, a study has been made of the detailed costs of caissons for the San Francisco-Oakland Bay Bridge and the Martinez-Benicia Bridge which data was kindly furnished in considerable detail by the Department of Rublic Works of the State of California and the Southern Pacific Company. Unit costs for these structures have been modified in accordance with the costs of labor and material in effect at the time each project was built and to allow for differences in physical conditions under which the work at the Carquinez Bridge was carried on. The unit cost of concrete, reinforcing steel, foundation piling, etc., in place, has been estimated using the cost of material and contract labor in effect at the time the structure was built. Table No. II following this gives the estimated costs of the piers and substructure based on quanti-[fol. 397] fies taken from the bridge plans and engineering records to which the unit costs referred to above have been applied.

Carquines Bridge
Table No. II
Sheet 1 of 3
Estimated Cost of Constructing the Bridge in 1925-1926 with Sufficient Finances

to Permit Letting to Contract by Competitive	e Bidding	4
1. Piers and Foundations:		
Pier No. 1 (north abutment):		
1,020 cu. yds. excav	\$1,020	
575 " a concepte " 14.00	8,030	**
575 * concrete	230	
5.099 los. reini. steet	200	
Pier No. 2:		\$9.300
13.048 cu. yds. gross vol. of 2 caissons. at 28.00	365,344	2 -
19 000 co. it removable cofferdam " 1 20	14.400	
1 904 ou rele concrete ininiers * 14 00	26.656	
12,000 sq. it. removable cofferdam. 1.20 1,904 cu. yds. concrete in piers. 14.00 23,594 lbs. reinf. steel. 045	1.100	
m . 1 m . 33 A		407:500
Piers Nos. 3a and 3b;		
These piers are practically duplicates of Pier No. 2		
Average elevation of bottom of foundations are:		
Pier No. 2128.4		
Diag No. 20 W		. 0
Pier No. 3aE -131.7 Pier No. 3bW -131.45		
Pier No. 3hW -131.45		
Pier No. 3bE130.6		
161 10.002		
Average130.4	*	
This average elevation has been used to compute gross vi	olume of	
caisson for Pier No. 2 and same total cost used for all p	iera	
Cost of Piers Nos. 3a and 3b-twice the cost of Pier No. 2	2	815.000
		1,231,800
Sub-total, forward		1,231.80
fol. 399 Sheet 2 of 3		
		1.231.800
		11,201.000
Pier No. 4:		
Cofferdam - 52' x 147':		5 -
Driving 320-12" x 15" wood sheet		14
piles	\$3,200	
Piling 340 MBM 60.00	20.400	
Waling 200 * 80.00	16.000	
piles at 10.00 Piling 340 MBM 60.00 Waling 200 80.00 Excavating (-25+ to -50)		
6 (III) ca. vds		
Unwatering and pumping	400	4
General expense 20%. Overhead and profit	9.200	
Overhead and profit	5.500	1
Total	60.700	
D 0 1 14 605 lin /4 1 0 0 9 60	52.650	
R. C. piling 14.625 lin. ft. st 3.60 Timber 6.500 -0.60		
Timber 6.500 -0.60 Concrete, seal 3.130 cu. yds 13.00 pier 5.190 14.00 Reinf. steel 88.900 lbs 045 Rail steel 133.600 02	3.900	
Concrete, seal 3.130 cd. yds	40.690 72.660	4
pter- 5, 190		
Reinf. steel 88,900 lbs	4.000	
	2.670 .	
Total		237 .270
Excav. 400 cu. yds at 12.00	4.800	
Concrete 983 * 14.00	13.760	
Reinf, steel 8,900 lbs	400	
rail steel 20.700 *	420	
Pier No. 5:  Excav. 400 cu. yds at 12.00 Concrete 983 14.00 Reinf, steel 8,900 lbs	3.600	
Total		22.980
Sub-total forward		1.492.050

\$1.687.630

The payments to contractors on piers and foundations, which appear to cover all the items contained in the above estimate, is \$2.305.079 or \$617.449 more than is estimated. In order to account for this difference reference is made to the construction history wherein it is pointed out that the early work on foundations had to be carried on by force account, without definite plans and subject to delays from lack of finances, which latter resulted in considerable loss of work already done, notably in connection with Pier No. 4.

### [fol. 401] b. Superstructure:

In making an estimate of the cost of the structural steel, the following total weights were taken from engineers' figures furnished in 1929 by Geo. J. Calder, then Vice President and General Manager of the American Toll Bridge Company:

Approach viaduct	• 3,343.270 lbs.
Towers, cantilever spans	- 3,481,500
Anchor and cantilever spans	17,095,910
Suspended spans	2,980,320
Hand rails	500,000
Piers Nos. 2 and 3	255,600
6	*

Total 27,656,600

These weights have been divided into kinds of steel in proportion to preliminary figures given by D. B. Steinman. Designing Engineer (See Engineering News-Record, May 12, 1927), and unit prices applied as follows:

Structural grade Silicon Eve-bars heat treat struct	14 · 239 · 190 10 · 317 · 500 2 · 848 · 000 251 · 910	 ·8.9 = 10.3 = 11.4 = 7.15 =	\$1,267,288 1,062,702 324,673 18,012
	27.656.600		92,672,675

The actual payment for this work, as given on the books of the company, is \$2,686,854 for contract work let by competitive bidding. The above estimate is a close enough check of the actual cost figure to establish its reasonableness. This work was let to contract by competitive bids.

The estimated cost by items of the concrete bridge floor, shown on the books as costing \$108,328 paid to the contractor, plus \$27,316 paid for reinforcing steel is:

965.0	00 lbs	vds. concrete reinf. steel:		.00	\$71.380 43.425
0	Total	dann .			

[fol. 402] The book figures covering contract payments apparently chargeable to this item appear, from the above estimates, to be rather high. The difference is, of course, a relatively small amount as compared to the total cost of construction.

# c. Miscellaneous Construction Work:

This work includes the construction of necessary bridge approaches, toll collecting facilities and office building, and a suitable fender system.

The expense for the approaches was partly composed of contributions to Joint Highway District No. 7 and to Solano County. On the books of the company is shown a separate account for approaches totalling \$25,121, and in Construction Work is an item covering a contract let to T. C. McGill for approaches to pier No. 1 amounting to \$10,202. The sum of these costs, amounting to \$35,323, is relatively small and was apparently necessary to develop access to the toll bridge.

Included in the actual book cost of the bridge is an item for buildings amounting to \$28,5% - of which \$11,460 is ap-

parently for revenue producing properties, the returns from which are additional to revenue from tolls. The difference, or \$17.094, represents the cost of toll house and garage and is apparently a reasonable charge against the toll bridge.

An estimate of the cost of reproducing the existing concrete fender around piers Nos. 3a and 3b, based on quantities taken from preliminary plans accompanying application to the War Department and dated July 16, 1927, is as follows:

	[fol. 403]	·	1				
,	[fol. 403] Piling, R. C			7,000 L.f.	at 4	00 \$148	.000
	Timber stub piles Concrete			40 MBM	at 80.	00 3	.200
	Concrete			4.330 c. y.	at 22.	00 - 9.	.260
0	Reinforcing Steel		500	0.000 lbs.	at	045 - 22	.500
	Sand (cushion)			3.200 c. y.	at 1:	50 4	.800
	Rails, plate, etc				at .		.440
	Structural box girders Cast Iton		400	0.0c0 lbs.	ar.		600
	Cast Iton		1.	5,000 rbs.	at	14 2	.100
					1		
					,	8311	.300
	Conting incles					15	
					•		
	, ,					\$326	.865.

The actual cost of the concrete fender which was let to contract by competitive bids was \$329,448, and the above estimate indicates that the actual cost is a reasonable one. The rock for the fill was furnished at the site by contracts let to Healy-Tibbitts Company and Daniels Contracting Company at a unit price of 75¢ per ton. The rock was placed in position through a 3-foot pipe under the supervision of the engineers of the company and with the use of company equipment. The exact amount of rock placed could not be obtained at this time but it is stated in the annual report to stockholders, dated April 2, 1929, to amount to 150,000 tons approximately. Using this figure and estimating the cost of placing the rock at 45¢ per ton, the total cost of this item is:

150,000 tons at \$1.20 = \$180,000.

The total cost of existing fender is, therefore, \$509,448 against a total charge for fenders on the company's books of \$625,103. The difference of \$115,655 is presumably the expenditure necessary for setting up, moving, and removing a temporary fender system. This analysis has in mind only the checking of the cost of constructing in order to repro-

duce the existing structure, using prices in effect at the full it was bind. Therefore, the cost of the temperary tender worselves not seen analyzed.

## 110, 404 J. Pivernead Casts

The determination of what are reasonable allowances of the nided in the estimated physical costs of the proper is a matter-involving many inchers. It addition to an above ance to cover the costs of engineering there also must be made an allowance for legal and thraucial expenses on needed with the littled promotion and the financing is reprotect. This subject has been given such consideration as the has perpetted and it further study indicates that the overhead affective set up herein should be modified; and research such study may be subhatted at a later hearthy of the street states after hearthy and the street states after the street states aft

the last expenses are generally grouped pader the re-

- of headers in expense; which includes the preparation of party of a specifications, the costs of letting to contract orders have surveys and investigations, laying our according to a free construction, inspecting and testing materials known general records and making reports.
- is Interest paid or lost during construction covering the into cost of money borrowed or field up during the period of construction.
- c. General expenses which include salaries and expenses connected with the manazing and financing of the proper during construction, issurance, injuries and damages, legal, fees, taxes, etc., for the same period.
- This is taken to include the cost of selling stock as we as the cost of obtaining franchises, incorporation, etc.

# [tol. 405] a. Engineering Expense:

Mr. J. A. L. Waddell, in his books Bridge Engineering, 1916, states that 6% is a proper allowance for engineering costs on large bridges, including the costs of inspecting and testing materials, and making a preliminary investigation and economic studies not including boring test

to the In this provide estimate of entire that the their half nichter ops, in bilowinse for tolendation exploration world he constituted. They earlies extinct brains only on the mage to the company mess amount to authorities of must construct on their s. This cost of many large include. pristing pel resigner in recent years have cost less than to Princes he considered provey in this case if it is taken police sign shaw certain easts as and necessary in order
 a. a. a. the promotion of a revealed managed business and a takentiate account who estimates are inization The assumption that work was let under condto a fit commenties building may bend to the conduction that the nexted of construction would dive been failurely. is the maker such conditions. It is, therefore in keyer that at it has not see ingother that a spiniter one; at their the was result from applying 86° to the estimated cost of our struction, which is less than the looke ist.

# Mic Interest During Construction

From Nov. 30, 1924 to May 31, 1925

In the above estimated construction cost, the pretrise has been taken that the work could be let by competitive biddens. In this case it is believed that the work could have used started not earlier than November 30, 1924, and the lefted at the actual time the bridge was opened to traffic. One this basis the following appears to be a reasonable schedule for financials the construction work:

ini. 4(n)

May 31, 1925 to Nov. 30, 1925

Nov. 30, 1925 to May 31, 1926

May 31, 1926 to Nov. 30, 1926

Nov. 30, 1926 to May 21, 1927

(to date of opening)

May 21, 1927 to May 21, 1928

(fender work only)

In estimating the cost of interest during construction; it has been assumed that money would be provided at the beginning of the project and would cost ~ . Also, that funds on deposit during construction, based upon the above financing programs would draw interest at the nominal rate

24 11 11

of 3%. The total cost of interest during construction on this basis amounts to \$313,563.

# c. General Expense:

A study of a number of previous cases which have been before the California Railroad Commission shows that percentages running from 1.75% to 6.50% have been used to cover general costs of legal expense, injury and damages, and miscellar couse charges including salaries, head office expenses, insurance, etc. It is believed that 4′ is a reasonable percentage to be used in the present case. The books of the company show an expense for \$12,600.62 covering taxes and license fees, and as this appear to be a reasonable figure to peaks necessarily incurred it is added to the above. The total reneral expense on this basis is \$220,571.

# d. Profibiliary Expense of Organization and Promo-

This item includes the discount upon sales of stock which under the authority of the Corporation Commissioner, was sold to the public for \$2.00 per share to not the company Slate per share. The cost of these commissions for the sale. (fol. 407) of such stock is given on the books of the company as \$148.823.80. It appears that this amount should be allowed as a part of the cost of the property, and in addition there should be an allowance to cover general and legal expenses of incorporation and organization. In Decision No. 8511, C. R. C. No. 19, page 243, the Commission has given its opinion with regard to a proper percentage. rate to cover these costs in the case of a ferry company, Using this opinion as a criterion, and considering the states ment made above as to engineering costs for promotion and organization work being included in the allowance for construction engineering, it is believed that 21/25 would be a reasonable percentage in this case. The total allowanes for preliminary expense is, therefore:

Commissions on Stock sales (actual) 212% of cost of construction

\$148,824 .126,800

\$275,624

fols 40s-409	Recapitulation		* ,
Item		Book Acets. allocated to- the item	Estimated Costs in this Report
Piers and foundations superstructure Tollhouse Other Buildings Approach work and contribution		\$2,305,078,64 2,822,498,87 17,092,77 41,460,76 35,322,70	\$1,687,630 2,822,499 17,093 35,323
Sub-total, Construction opening to traffic.  Existing fender system and misc		\$5/191.453.71 825:102.79	\$1,562,545 500,448
Total Construction Cost. Construction Engineering Interest during construction General Expense Preliminary Expenses		390,076 11 688,092 56 492,018 27	\$5,071,993 304,320 313,563 220,571 275,624
Total		87, 863, 451, 17	\$6 186,071

'[101, 410] Mr. Rowell: Will you describe the material contained in this exhibit in such detail as you think desirable.

Mr. Mitchell?

A. The report covers an engineering analysis of the construction work of the Carquinez Bridge as it exists at the present time. The purpose of the report was to assist in determining the reasonableness of and checking the book costs of construction. And in order to obtain a suitable tasis for doing this I have estimated the cost of the bridge as it exists today at prices which were in effect at the time it was built and on the premise that all the major items of the work were let by contract under competitive bidding conditions, and to responsible contractors. I may explain at this time that the accounts of the Toll Bridge Company do not break down the construction cost except to list the contracts, which list I have included in this report, and that also the contracts themselves were either on a cost plus basis or lump sum and not broken down into bids on units of the construction, in other words. Therefore, in order to check the cost it seems logical to build up an estimated cost of the construction under the same conditions. And in order to do so it was necessary to base this cost on some premise, as the one I have chosen, that there were sufficient finances available at the beginning of the project to permit the letting of all the major items to contract by competitive bidding.

I have also included in the report a general history of the construction of the bridge, in which is shown, as far as I

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have been able to obtain from the records of the Company and in talking to its officials, the actual occurrences in confol. 411] nection with contract work. It will be noted, of course, that in comparing—or, first, I want to state that, along with the estimated costs which I have prepared, I have shown in the final tabulation in the report the book costs which, as near as I could ascertain, are comparable with the portion of the work which I have estimated. It will be noted that there are some important differences. These may be pointed out. First, in the case of construction work on the piers and foundations, there is a material difference.

Q. To which page are you referring now!

A. Referring now to page 27, the final tabulation in the report. Also in the case of the existing fender system, a difference, and in the overhead costs. The construction history I think points out the reason for a considerable portion of the difference with regard to piers and foundations, that is, that the extra cost incurred by the Company was largely due to delays which, in turn, were the result of lack of finances to prosecute the work in an efficient manner. In the case of the fender system, there was a temporary fender system installed previous to the fender that is there at the present time. And I have been unable to break down this cost and, as I have said, predicated my estimate upon producing what is there at the present time.

Q. In other words, you have estimated what you considered the reasonable cost of the fender which is in place today without including the preliminary fender?

A. That is correct.

From that we go on to the construction history and con[fol, 412] tracts which I have referred to before. This work,
of course, as the general history shows, was started with
the idea of financing it through the sale of stock to the
public. Considerable difficulty resulted in selling stock and
it was necessary to change the financing to the other interests held by the organizers of the American Toll Bridge
Company. I should say that it has been stated by the Company officials it was impossible to obtain money to complete
the entire project until a certain amount of experimental
work had been done by the Company and they had con-

tributed a certain amount of their own funds. It was, therefore, in April, 1925, some 2 years after the initial start of construction on the bridge, before money was available to let the work to large contractors on a basis of competitive bidding.

Mr Rowell: Have you included any allowance for property damage, acquisition of rights of way, and such items!

A. No, the report states that no allowance at this time has been made for right of way and property damages. That is being investigated at the present time and I understand will be submitted in a later report in this case.

### STEWART MITCHELL recalled.

Direct examination resumed:

Mr. Rowell: You have prepared an exhibit which was introduced at the last hearing as Exhibit No. 3, have you not?

A. Yes, sir.

Q. Have you any corrections or changes to make in that exhibit?

A. It was stated in the previous report that the question [fol: 413] of construction costs had been pretty thoroughly covered and an exhaustive study made, but that in connection with the overhead charges the time was somewhat limited and it was expected that it would be given further consideration. And a further check of these costs indicates that a further study in regard to interest during construction would be advisable, and I have included such a study in a new report to be submitted at this time.

Mr. Rowell: We offer that exhibit in evidence at this time.

Commissioner Riley: There being no objection, it will be received as Commission's Exhibit No. 16.

(Here follows, Exhibit No. 16—pages 1 to 13 (ending with "amounted to \$688,092,56") and 15, 16, 17, 19, inclusive.)

# [fol. 414] EXHIBIT No. 16, BY THE COMMISSION

# California Railroad Commission .

Transportation Department, Engineering Division,

## Study Dealing With

1. Cost of Reproduction, New

2. Misc. Physical Costs.

 Interest During Construction for the Carquiner Bridge.

Case No. 4259 "

San Francisco, California, November 30, 1937.

Stewart Mitchell, Senior Bridge Engineer, Division of Hichways, Department of Public Works, State of Calfornia.

[fol. 415] I. Reproduction Cost New of the Carquiner Bridge

The following report covers the estimated reproduction cost new of the Carquinez Bridge if completed November 30, 1937, with sufficient finances to permit letting all work by contract to competitive bidders. Wages and prices of many construction materials are generally higher today than at the time this bridge was constructed, but the developments of engineering knowledge and construction methods along this line; would more than counteract the increased cost regulting therefrom.

The Carquinez Bridge was one of the first in a phase of long span bridge construction in the United States, and the first structure to be built across any portion of San Francisco Bay. Its location was adjacent to an active fault plane, its foundations were at that time among the deepest ever constructed and their construction was further constilicated by the deep water and strong tidal currents. The method used to float the suspended spans into position and raise them into place had resulted in the loss of one such span when tried at the Quebec Bridge and, though here accomplished without difficulty, the previous experience presented a definite hazard. These uncertainties affected

the actual costs of the structure, and would naturally have been redected in the bid costs under any system of financing at that time.

if al. 416. Since the construction of the Carquinez Bridge a great number of long span bridges have been built throughout this country. Construction methods have been instructions of standardized through experience. Several major structures have since been completed across various partions of the San Francisco Bay, including the San Francisco Bay, including the San Francisco Bay, including the Bridge. These two bridges have beinger spans and deeper foundations than the Carquinez Bridge. Plants in the San Francisco Bay area have been established or equipped to tablicate structural test in quantities sufficient for a bridge factor and deeper bridge of the factor and decayery of mass level as a large scale product a and decayery of mass level as a francisco structure and established on the factor and decayery of mass level as a francisco to a sufficient as and decayery of mass level as a francisco to a sufficient as and decayery of mass level as a sufficient to continue the central page of the continue to a cont

### Substructure : :

Unit costs were determined through comparative studies of recent California Division of Highway comparative and bid prices on recent may rebridge contracts for unrounding country. The unit cost of the calssons plu cube control to country. The unit cost of the calssons plu cube cased as determined in the previous retoring assons of like eleptin on the San Francisco Cakes. By Bridge and on the Southern Pacific Company. Marson Benicle Bridge have been no direct to contorn to 1900 has foll 417, prices and the use of present day not have an equipment. Concrete bosts are based on the 1900-1907 prices in place is based on recent bids, including the recently advertisely railroad facilities for the San Francisco has land Bay Bridge and the Port of Cakeand connection advertisely railroad facilities for the San Francisco has land Bay Bridge and the Port of Cakeand connection advertisely railroad facilities for the San Francisco has land Bay Bridge and the Port of Cakeand connection advertisely railroad facilities for the San Francisco has land Bay Bridge and the Port of Cakeand connection advertisely railroad facilities for the San Francisco has land Bay Bridge and the Port of Cakeand connection advertisely railroad facilities for the San Francisco has land to conform to the relative magnitude of the problem.

Though concrete can be produced at a lesser cost today, slight increases in the costs of substructure steel and timber piles tended to balance this saving and the estimated cost of the substructure is found to be approximately the same as that estimated for 1925-26 construction:

### Superstructure:

Unit prices for structural steel have been built up from a consideration of all items which enter into the finished cost of this job, and by comparison with recent bid prices on the larger projects. Though the base price of carbon steel has been higher during 1936-37 than luring 1925-26, premiums on special steels were higher at the time the structure was built so that the base price used here for silicon steel is practically unchanged. In the case of heat treated eyebars, the cost is considerably less. However, the hazards and uncertainties referred to above undou tedly were reflected in the actual costs of structural steel v. In the bridge was constructed, and this factor, together with improved local facilities, should make a small net reduction in steel costs [fol. 418] at the present time.

Furthermore, improved methods of construction would also reduce erection costs today. The south approach trestle was originally constructed on high falsework bents founded on piles. This falsework represented a major portion of the erection cost. Light trusses of this length would probably be constructed on the ground and hoisted into place with present day equipment.

Cheaper concrete prices today should effect considerable, saving as compared to the original cost of the concrete bridge deck. On account of all the above factors the total estimated cost of the superstructure at the present time is found to be somewhat less than the original cost.

### Miscellaneous Construction:

The estimated cost of the fender system and the rock ill is found to be virtually the same as that estimated for 1925-26 construction. Here again lower concrete prices are balanced by the higher prices of reinforcing and other steel.

The tollhouse and garage are estimated at a lump sum of \$20,000 as compared to the actual cost of \$17,093 due to relative prices in general building construction work.

The length of approaches that might have to be paid for under present day conditions is indefinite. The existing approaches to the bridge have been constructed or imfol. 419] proved by the State with public funds and no

more than actual costs shown on the company's books for this item can be included.

To all construction items, except approaches, an addition of 5%, is made to cover unforseen conditions and changes during construction.

### Overhead Costs:

Sub-total forward

The percentages set up to cover overhead costs in the previous estimated cost of constructing the bridge in 1925. 26 with sufficient finances to permit letting to contract by competitive bidding should apply in general to the cost of reproduction new. Six per cent of the total construction cost is again allowed for engineering expense and four per cent is allowed for general expense and in addition the actual book charge of \$17,691 for taxes and license fees. Two and one half per cent of the construction cost is further added to cover the preliminary expense of organization and promotion, but the original cost of selling stock is unitted since the schedule of interest during construction used herein assumes that the project is to be financed entirely by the sale of bonds.

### fol. 420

Estimated Cost of Reproducing the Carquinez Bridge New as of 1936 and 1937

Substructure:

### Por & !-

11.5 6 4				
Excavation Concrete Reinf, Steel	1,020 c. y. 575 c. y. 5,099 lbs.	at 1 00 = 13 50 = 0 05 =	\$1.020 7.763 255	\$0.038
Pier #2.			1	
(Considered average der Gross vol. caissons Removable Cofferdam Concrete (piers) Reinf, Steel Piers #3a and 3b (Same as	13,048 c. y. 12,000 s. f. 1,904 c. y. 23,794 lbs.	1.20 = 1.3.50 = 0.05 =	25.704 1.180	\$406.628 • \$813.256
Pier • 1:				
Cofferdam 52' x 147' Excavation R. C. Piling in place. Timber Piling place. Concrete (seal) Concrete (pier) Reinf. Ste J. Rail Steel	6,090 c. y. 14,625 l. f. 6,500 l. f. 3,130 c. y. 5,190 c. y. 88,900 lbs. 133,600 lbs.	at 1.00 =  " 3.60 =  " 0.75 =  " 13.50 =  " 0.05 =  " 0.03 =	52,650 4,875 34,430 70,065 4,445	<b>\$</b> 227,473

fol. 421]	175	7—Con					
Brought forward		3				/ -	21 456 I
Pier #5:							\$1,300,
Excavation	40	Dev	m/L	12 0	-	\$4,800	
Concrete	98	3 c. v.	4	13.5	0 =	13,270	
Reinf. Steel.	8,90	O lbs.		0.0	5 =	445	
Rail Steel	20,70	3 c. y. 0 lbs. 0 lbs.	-	0.0	3.00	621	
Tim. Piles in place	6,00	DI. f.	•	0.7	5 =	4.500	
Piers #6 to #8 Inclusive:				* ;			\$23,
Excavation	1,00	) c. y.	at	1.00	) =	-\$1,000	
Concrete	1,12	3 c. y.		13.50	) =	15,228	
Reinf. Steel	15,60	lbs.		0.0	=	780	
Tim. Piling	1,00 1,12 15,60 17,64	drr.		0.70	, =	.13,230	\$30,
Piers #9 to #11 Inclusive	: .	1.					,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,
Excavation	15	) c. y.	at	1:00	) =	\$150	
Concrete	233	0 c. y. 2 c. y. 0 lbs.		13.50	) =	3,132	
Reinf. Steel	3,00	lbs.	-,	U.U	, =	150	\$3,
Pier * 12:							
Excavation	150	bc. y	at	1.00	) ==	\$150	
Concrete	19	c. y.		13.50	) ==	2,579	
Pier * 12:  Excavation	4,200	J Iba.	4.	0.0	4	210	\$2,
Riprap Piers #2 and #3		. е		1			\$40.
Exploration of Foundation	18						\$45.
		_					-
Total Substructure.							\$1,601,
fol. 422]	2 "		1			. 1	
Superstructure:	*.	1. 10		. 5		1	
Steel:						•	
	14.491	.100#	at.	0.08	5 = S	.231 743	
Struct. Sil. steel	10,317	,500#	. #	0.09	) =	928,575	
Struct. Car. steel Struct. Sil. steel Heat tr. eyebars	2,848	3,000#	8,	0.09	)5 =	270,560	
	*	1/:	a .				\$2,430,
Concrete Floor:	9 500			10 00	- 1	****	1 1
Concrete	965 000	c. y.	at	18.00	-	48 250	
Reilli. Steel	300,000	100.	-	0:00	·	20,400	112,
the state of the s							
. Total Superstructure	8	: : 20				*******	\$2,543,
Miscellaneous Const		-				· · · · ·	
ender:							. •
	37,000	1. 8.	at	4.00	-	\$148,000	
C. C. FHINZ III DIBOC	. 40	MBM		80.00	Time .	3,200	
Tim. stub. piles	30	C. V.		20.00	= :	86,600	
R. C. Piling in place Tim. stub. piles Concrete	4,330	11		0 35		25,000	
Reinf. Steel	4,330	·lbs.			-		
Concrete	4,330 500,000 3,200	lbs.	. es	0.05		6.300	
Concrete Reinf. Steel Sand (csuhion) Rails, plete, etc. Struct. Box Gir.	4,330 500,000 3,200 136,000 400,000	lbs.	*	0.05	-	6.300	•
Reinf. Steel	4,330 500,000 3,200 136,000 400,000	lbs.	*	0.05		6.300	
Concrete Reinf. Steel Sand (csuhion) Rails, plate, etc. Struct. Box Gir. Cast Iron	4,330 500,000 3,200 136,000 400,000 15,000	lbs. c. y. lbs. lbs. lbs.	* *	0.05 0.08 0.14		6.300 32,000 2,100	\$308,
Concrete Reinf. Steel Sand (csuhion) Rails, plate, etc. Struct. Box Gir. Cast Iron  Rock Fill 150,000 tons at	4,330 500,000 3,200 136,000 400,000 15,000	lbs. c. y. lbs. lbs. lbs.	*	0.05 0.08 0.14		6.300 32,000 2,100	\$308,8 180,0
Concrete Reinf. Steel Sand (csuhion) Rails, plate, etc. Struct. Box Gir. Cast Iron	4,330 500,000 3°,200 136,000 400,000 15,000	lbs. c. y. lbs. lbs. lbs.		0.05 0.08 0.14		6.300 32,000 2,100	\$308,8 180,0 20,0

### [fol. 423] Summary:

Piers and Foundations Superstructure Fender System & Rock Fill	\$1,601,640 2,543,370 488,500
Tollhouse & Garage	20,000
Contingencies at 5%	4,653,510 232,676
Approaches (actual expense)	4,886,186 35,323
Total Construction Cost  Construction Engineering at 6%  General Expense at 4%  Taxes & License Fees (actual)  Preliminary Expense at 2½%	4,921,509 295,291 196,860 17,691 123,038
Total Construction and Overhead Expenses (exclusive of interest during construction)	\$5,554,389

### [îol. 424] II. Miscellaneous Physical Costs

### Furniture and Equipment:

The investment in this item amounts to \$24,353.32 as shown by the company's books. Dividing this between the Carquinez and Antioch Bridges in the proportion used by the company in the case of other cost values common to both bridges (80.762% to the Carquinez Bridge), the book charge to the item would be \$19,668. The item is small and also there appears to be no reason to question its amount.

### Right of Way:

No check of the title to lands which the company has shown on its records has been made. The company holds an easement across the land of the Southern Pacific Company on the south side of the Straits for which they pay \$200 per year as rental, this rental being included in the cost of operation. A general study of those parcels of land held by

the company which appear to be necessary to the proper maintenance and operation of the bridge, and of the costs of similar lands purchased by the State of California for right of way purposes in that vicinity, indicates that a value of \$30,000 would be ample as a fair value for this item.

For the purposes of establishing a rate base it is, therefore, estimated that \$50,000 would be a reasonable value to use for the sum of the two factors of furniture and equipment and rights of way.

### [fol. 425] III, Interest During Construction

### General Discussion:

The matter of interest during construction is deserving of special consideration as it is a relatively large item in the cost of construction and the particular assumptions made in computing it, make important differences in the item itself. The factors to be considered in the computation of interest cost are: The time required for construction and time schedule of funds required during that period; how far ahead of the actual work the funds must be obtained in order to be safe; the rate of interest which will have to be paid on borrowed money and the rate that can be obtained for funds on deposit until they are needed.

To establish a reasonable rate of interest which must be paid on borrowed money it is necessary to consider such factors as:

- 1. The condition of the bond market at the time or shortly before it is assumed construction will start.
- 2. The previous record and established credit of the borrower.
- 3. The risks attendant upon the construction of the project, in this case consisting almost entirely of the bridge structure.
- 4. The expected traffic and revenue from tolls during the franchise life remaining after the construction is completed.

### [fol. 426] General Assumptions:

In making the following estimates for interest during construction it is kept in mind that the borrowing is being done by a private corporation. It is assumed that the credit rating of the corporation holding the franchise is good and that the risks connected with the investment are those attendant upon the construction and future operation of the toll bridge. The condition of the bond market at the time of borrowing is generally known.

The entire cost of construction is assumed to be financed by borrowing and while the State of California has been able to obtain funds for the construction of the San Francisco-Oakland Bay Bridge in reasonable sized installments as needed, a private toll bridge company would probably have to issue bonds to cover the entire cost before starting construction. Funds not needed at once for construction will be placed on deposit and draw the prevailing interest rates for short term loans or savings accounts.

### Book Costs:

In a previous report submitted by Mr. Coleman in connection with this case, it was stated that the work of construction prior to April 1925 was financed by the sale of stock and funds borrowed from the Rodeo-Vallejo Ferry Co., etc. The Construction work after that time was financed through the sale of \$4,500,000 first mortgage 7% and \$2,000,000 sec-[fol. 426a] ond mortgage 8% bonds at a ten per cent discount.

The cost of fender construction was financed by money obtained from toll revenues after the bridge was opened to traffic May 21, 1927. The cost of selling the company's stock as allocated to the Carquinez Bridge on the books amounted to \$476,707.70 and interest during construction amounted to \$688,092.56.

### [fol. 427] Computed Interest Cost:

In order to check the reasonableness of the actual cost of financing the project, the amount of interest accruing during construction has been computed, assuming that bonds covering the entire cost would be issued at 8% interest and 3% interest would be received from funds on deposit until needed in accordance with the estimated schedule of construction. The estimated schedule of construction has been given in the previous report dealing with the cost of construction.

The cost of interest on this basis amounts to \$1,103,634 as shown in the attached table No. 1 prepared by Mr. A. C. Jenkins of the engineering staff of the Railroad Commission.

Interest for Cost of Reproduction New:

In this case it would be reasonable to assume that money must be borrowed during the latter part of 1935 previous to the start of construction work. At that time only about 12 years of the franchise life would remain and it is very unlikely that a project of this kind would be undertaken under such conditions. An earning period of less than ten years would remain in which to amortize the cost and obtain a reasonable return on the investment. 31/2% bonds issued by the company as a going concern during 1935 were sold at a discount but were quoted at about 103 at the beginning of 1936 indicating that at that time they could have been sold to net the company their par value. The interest rate would have been materially lower had there been ten or fifteen more years of franchise life remaining. Although [fol. 428] the rate could not be attained for securities issued by a private corporation, it is f interest to note that bonds for the construction of the Golden Gate Bridge backed by the taxing power of the highway district which includes San Francisco County, sold in 1935 bearing a 33/4 % rate of interest.

For cost of reproduction, a bond issue of \$6,400,000 will be necessary to cover all construction and overhead costs with a small factor of safety, and assuming a construction period of  $2\frac{1}{2}$  years, an interest rate on borrowed funds of  $5\frac{1}{2}$ % and 2% on funds on deposit for six months or more, the cost of interest would be \$736,455 as computed in the attached table. In consideration of the possible reduction in the construction period due to improved methods of construction previously set forth, the computed cost of interest on the above basis and a 12 year or longer franchise period would be conservatively large.

[fol. 429]

### Table No. I

### Bond Int. Rate = 8% Bank Int. Rate = 3%

Data of .	Withdr	awale	Interest Earned		
Date of Withdrawal	Construction	Bond Interest		s Bank Balance	
1924:					
Nov. 30				\$6,700,060	
Nov. 30	\$400,000		*****	6,300,000	
Dec. 31		\$44,667	\$15,750	6,271,083	
1925:	*				
Feb. 28	250,000		31,355	6,052,438	:
May 31	450,000		45,393	5,647,831	
June 30		268,000	14,115	5,393,946	
Aug. 31	250,000		26,969	5,170,915	
Nov. 30	1,000,000		38,782	4,209,697	
Dec. 31	.1,000,000	268,000		3,952,221	
1926:					
Feb. 28	1,000,000		19,761	2,971,982	
May 31	500,000		00 000	2,494,272	
June 30		268,000	6,236	2,232,508	
Aug. 31	500,000		11,163	1,743,671	
Nov. 30	500,000	********	13,078	1,256,749	
Dec. 31	300,000	268,000	3,142	991,891	
1927:		200,000	-,-		
Feb. 28	500,000		4.959	496,850	
	200,000	223,335		77,241	•
May 21	200,000	2,667		74,767	
June 30	000 000	2,001	934	(124, 299)	
Nov. 30	200,000	16,000		(140, 299)	
Dec. 31		10,000		(130,200)	
1928:		*** ***		(159 694)	
May 31		13,335		(153,634)	
		\$1,372,004	- \$268,370		1.
	. ,	268,370			
+		200,010			
		\$1.103.634	Interest durin	g construction	
	** 46	\$1,100,004	THIEFER THE	e comprinction	

### ( ) Indicates Red Figures.

### [fols. 430-431]

Recapitulation of Cost Studies Made to Date. Includes Book Charges and Revised Estimates Covering Engineering Analysis of First Cost and Estimated Cost of Reproduction New .

Item	Book Accounts Allocated to the Item	Check Analysis of First Cost	Cost of Reproduction New
Total Construction Cost	390,076.11 492,018.27 476,707.70 (1)	\$5,071,993 304,320 220,571 126,800 50,000	\$4,921,509 295,291 214,551 123,038 50,000 736,455
Interest during construction	688,092.56	1,103,634	730,433

<sup>\$7,863,451.17 \$6,877,318 \$6,340,844

(</sup>i) Company does not segregate on its books lands that are directly applicable to bridge purposes in connection with the Carquinez Bridge.

[fol. 432] Mr. Rowell: You may explain the exhibit, Mr. \* Mitchell.

A. This exhibit completes the studies that were started in the previous report in which a check analysis was made of the cost of construction of the bridge. In this report we have also estimated the cost of reproduction new of the bridge at average prices existing over the past two years, which are assumed to be a reasonable construction period.

As pointed out in the report, at the time the bridge was built it was the first of a series of long span bridges that were built in the United States and the first structure of that kind to be built in the vicinity of San Francisco Bay and the foundations of the bridge at that time were among the deepest ever constructed. The construction was also complicated by the conditions in the Straits, such as swift current and deep water. And the method used to float the central spans into position was rather new at that time, it had been tried on the Quebec Bridge with rather disastrous results, and although it was accomplished here without any difficulty it, of course, reflected itself in the hazard to be faced by those undertaking the project. Since that time, of course, there have been very many-I wouldn't say very many, but a large number-of long span bridges that have been built throughout the country and in the particular Bay area, such bridges as the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge, which had longer spans and deeper foundations than the Carquinez Bridge. plants in the Bay area have been established or equipped to fabricate structural steel in large quantities, and the production of concrete aggregates and concrete itself has been [fol. 433] developed to a considerable extent since that time. All those factors we consider join in counteracting the generally higher labor and material prices of today.

It was stated at the time of presenting the last report that certain items had been omitted, which included the miscellaneous physical costs of furniture and equipment and of rights of way. Investigation shows that the amount of these items in any case is a relatively small part of the cost of the project, and in the particular case of right of way we have not had time to check into the title of the lands which the Company has shown on its records. Also there is a large acreage of land owned by the Company which would not be necessary for bridge purposes and, therefore,

it becomes necessary to segregate certain parcels of land from the other in order to arrive at what would be a fair amount to allocate to the bridge itself. We find that the land in general consists of-would consist of a small portion at the north end of the bridge to cover the immediate approach, and the toll plaza, as the highway approaching the bridge has been reconstructed entirely by the State of California. A general study of the parcels of land which were held by the Company and apparently necessary for the operation of the bridge, and of the cost of similar property purchased by the State in that vicinity, indicates that the value of \$30,000 would amply cover the present-day cost of such property. I might call attention to the fact that the crossing of the Southern Pacific Company's lands and tracks is covered by an easement on which the Company pays \$200 a year, and such amount is included in the cost of operation.

[fol. 434] In the matter of furniture and equipment I find that the investment shown on the books amounts to \$24,353, and if this is divided between the Carquinez and Antioch Bridges in the general proportion used by the Company in the case of other physical costs, that is, approximately 81 per cent to the Carquinez Bridge, the amount of the item would be \$19,668. This item is also relatively small and there appears to be no reason to question this amount. I have, therefore, recommended that, for purposes of establishing rate base, that \$50,000, that is, the sum of \$19,668 and the \$30,000, in round numbers, would be a reasonable value to use for the sum of these two factors, that is, furniture and equipment, and rights of way.

A. Coming to the matter of interest during construction, in the previous report it was recommended that, for purposes of checking the actual cost of interest during construction, it would be assumed that a rate of 8 per cent would have to be paid on borrowed money and that funds on deposit would draw 3 per cent interest and that all the money would have to be borrowed by a private corporation previous to starting the work, in order to be safe and in order to meet the payments as they became due. Apparently there was some misunderstanding in figuring the amounts in conformity with that assumption, and so a further study indicates that we should revise those figures. And in this report I have shown in detail the amount of interest during

construction that would be arrived at on that basis. This Table No. 1 attached to the penort shows that. In general the matter of interest during construction is deserving of [fol. 435] special consideration, as it is a relatively large item in the cost of construction and the particular assumptions made in computing it make very important differences in the item itself. The factors, of course, to be considered are the time required for the construction and the time schedule of the funds required during that period and how far ahead of actual work the funds must be obtained in order to be safe, as well as the rate of interest paid on borrowed money and the rate obtained for funds on deposit until those funds are needed. The rate of interest to be estimated would depend on the conditions of the bond market at the time, or at least a short time before assumed construction will start, as well as the previous record and the established credit of the borrower and the risks attendant upon the construction of the project, which in this case, of course, consists almost entirely of a large bridge structure. And finally there are the expected truffic and revenues from tolls to be obtained during its franchise life which remains after construction is completed. And in this report it has been kept a in mind that the operating is to be done by a private company. It is assumed that the credit rating of the corporation which holds the franchise is good and that the risks are just those attendant upon the construction and future operation of the bridge. The entire cost of construction is assumed to be financed by horrowing and the entire amount " obtained previous to starting construction, for, although the State of California has been able to obtain funds for the construction of the San Francisco-Oakland Bridge in ressonably sized installments as the money was needed, it is [fol. 436] not believed that a private toll bridge company, or at least at that time, would have been able to follow this procedure and would have had to obtain the entire amount of funds by a bond issue previous to starting construction. It has been assumed that funds not needed at once for construction would be placed on deposit at prevailing interest rates for short term loans or savings accounts.

For purposes of comparison I have included a statement as to the book costs covering the cost of financing the project. And as has been stated in the previous report put in by Mr. Coleman at the last hearing, the work of construction prior to April, 1925, was financed by the sale of stock and funds borrowed from the Rodeo-Vallejo Ferry Company and other sources. The construction work after that time was financed through the sale of \$4,500,000 first mortgage and \$2,000,000 second mortgage bonds, the first mortgage bearing 7 per cent and the second mortgage 8 per cent interest rate, and sold at a 10 per cent discount.

The cost of the fender construction was financed by money chained from toll revenues after the bridge was opened to

traffic on May 21, 1927.

The cost of selling the Company's stock as shown on the books amounts to \$476,707, as shown in the previous report. and the interest during construction amounted to \$688,092. We have obtained from representatives of the Toll Bridge Company a further distribution of the item of interest during construction, that is, in the amount of \$688,092, and that is shown in the report. It shows in a general way the [fol. 437] charges for each time period throughout the construction of the bridge. And in order to check the reasonableness of actual cost of financing the project, the amount of interest accruing during construction has been computed on the assumptions mentioned before, that is, borrowing at 8 per cent, and 3 per cent interest on funds on deposit. As I stated before, the table showing the actual cost is prepared by a representative of the Railroad Commission's staff and has been attached to the report.

Mr. Thelen: I understand that you have now increased your estimate of reasonable cost of original construction from \$6,186,071 to \$6,877,318?

A. Yes; and that is due practically to recomputing the interest during construction on the basis there.

Mr. Rowell: Mr. Mitchell, hve you also made a similar study of the cost of the Antioch Bridge!

A. Yes, I have.

Mr. Rowell: I ask that it be introduced and given the next exhibit number.

Commissioner Riley: It will be received as Exhibit No. 17 by the Commission, if there is no objection.

(Here follows Exhibit No. 17-page 7.)

[fol. 438]

### COMMISSION EXHIBIT No. 17

### California Railroad Commission

Transportation Department, Engineering Division
Study of Construction Costs in Connection With the
Antioch Bridge

Case No. 4259

San Francisco, California, November 30, 1937.

Stewart Mitchell, Senior Bridge Engineer, Division of Highways, Department of Public Works, State of California.

Recapitulation of Cost Studies Made in Connection with the Antioch Bridge

		Estimated	Estimated
Item	Book Accounts allocated to the item	Costs 1924–25 (Original Construction)	Coste 1936–37 (Reproduction New)
Construction Cost	\$1,262,876,23 165,424.30 163,831.30 113,554.68 28,790.51	\$1,023,657 61,419 95,597 25,591 133,873	\$1,004,021 60,241 94,812 25,101 91,930
Total	\$1,734,477.02	\$1,340,137	\$1,276,105

[fol. 440] Mr. Rowell: Well, you might recapitulate, Mr. Mitchell, though, and give a summation of the results.

A. We have been able to obtain less detailed information with regard to the construction of the Antioch Bridge, that is, its construction history. In the case of the Carquinez Bridge, with my connection with the State, why, we made studies early in its operating history and were able, being more interested in the Carquinez Bridge, to obtain more detailed information from those who had charge of the construction at the time. It is a little difficult now to go back and get similar information for the Antioch Bridge. at least within the time that has been available to prepare the report. However, we followed the same procedure in estimating a reasonable cost of construction at that time, based upon the assumption that ample finances were available to let the entire work to contract by competitive bidding. As before, we have shown the actual charges on the Company's books which are allocated to the various items of construction, in so far as it has been able to allocate

them, and we have estimated the costs of construction on the basis I just mentioned, as of 1925-1926 prices and again as of 1936-1937 prices, as to cost of reproduction new.

Q. You intended to state 1924-1925 prices, did you not? A. Yes, 1924-1925. I was thinking of the Carquinez Bridge in that case. This bridge was completed a little earlier. There was not time available to get the detailed break-down of the estimate of construction cost at this time, and if that is considered necessary, why, we can have copies made of that and furnish them to the parties inter-

[fol. 441] J. G. HUNTER, a witness called on behalf of the Commission, being first duly sworn, testified as follows:

Direct examination:

Mr. Rowell: Will you state your full name and your position, Mr. Hunter?

A. J. G. Hunter; Transportation Engineer in the Engineering Division of the Transportation Department, California Railroad Commission.

Q. Will you state how long you have held that position and generally what experience you have had as an engineer?

A. I was appointed transportation engineer in 1928. Previous to that I was connected with the engineering division as assistant engineer. I was employed originally by the Commission in 1920. For about 3 years I was in the hydraulic division, and following that time and up to the time I was appointed transportation engineer I was in the Transportation Department.

Q. Have you prepared a proposed exhibit in this proceeding entitled "Analysis of the operating results of Carquinez Bridge and estimates of future travel and reve-

nue"?

ested in it.

A. I have:

Mr. Rowell: I ask that the exhibit referred to be received in evidence.

Commissioner Riley: There being no objection, it will be received as Commission's Exhibit No. 19.

(Here follows Exhibit No. 19—map preceding page 1; pages 10, 11, 12, 13; and attached exhibit being Ordinance No. 171 of Contra Costa County, pages 1 to 8, inclusive.)

[fol. 442]

COMMISSION EXHIBIT No. 19

Witness Hunt r

California Railroad Commission

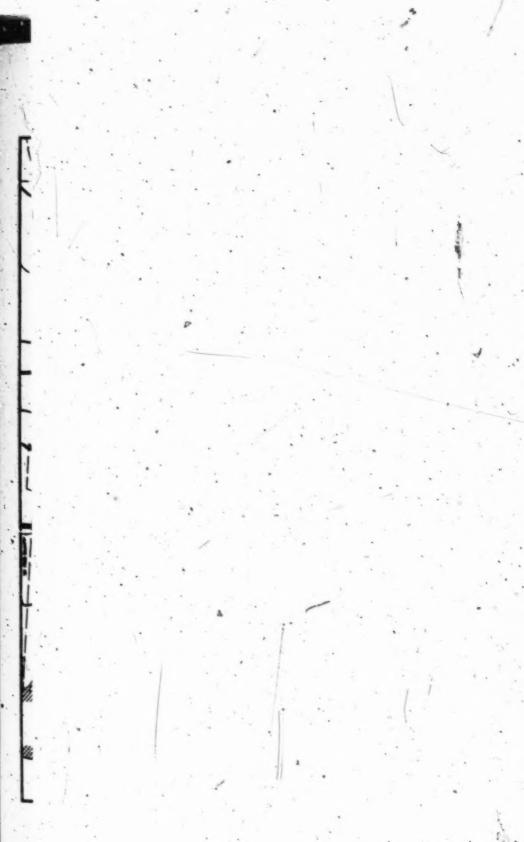
'1 ransportation Department, Engineering Division .

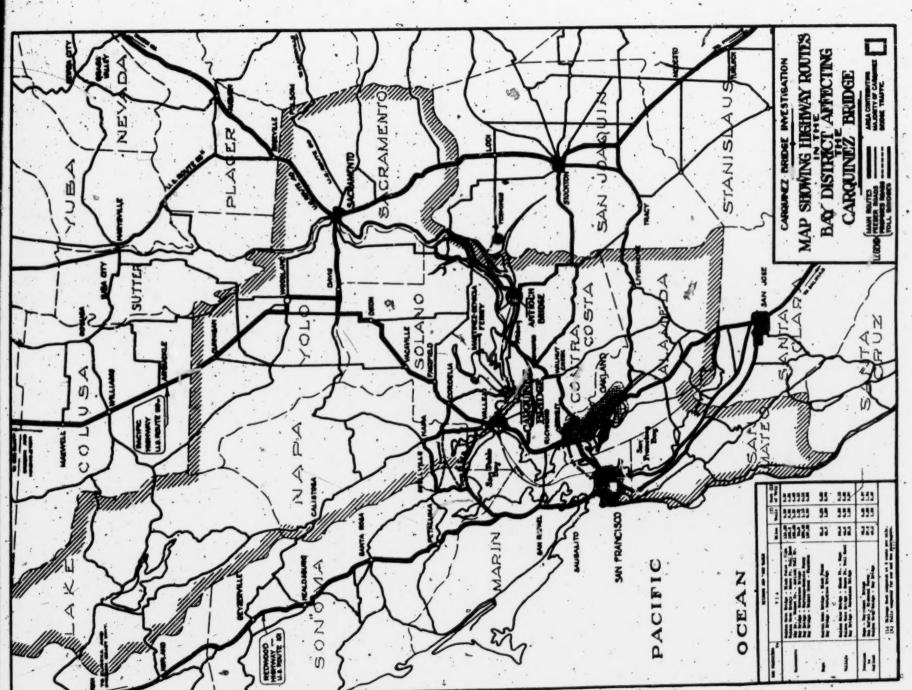
Analysis of the Operating Results of the Carquinez Bridge, With Estimates of Future Travel and Revenue

Case No. 4259

San Francisco, California, November 30, 1937. J. G. Hunter, Transportation Engineer.

(Here follows one photolithograph, side folio 442a)







[fol. 443] Estimated Results of Traffic for Years 1936-1937, if a Rate of 50-Cents for Automobile and Passengers up to and Including Five Had Been Applied

In comparing the rates of the Carquinez Bridge with the other major toll bridges across the San Francisco Bay and its tributaries, the most outstanding difference is in the tolls for automobiles and passengers. The two major bridges, viz., the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge, now have a toll of 50 cents for an automobile and passengers up to and including five, whereas the rate on the Carquinez Bridge is 60 cents per automobile plus 10 cents per passenger.

The following tabulations set forth the results of our study if the same toll for automobile and passengers as obtains on the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge had been applied to 1936 traffic and that estimated for 1937 over the Carquinez Bridge. The results of this study are set forth in the following tables:

266							
	Revenue Revenue \$854,598.00	1,020.50	\$284,198.15 20,686.50 17,199.59	\$272,064.24	Revenue	\$338,560.00 48,300.27 2,448.30 6,962.60 22,758.69	\$1,564,444.00
	1987 Number of Vehicles 1, 424, 331 86, 897	1-	141,227 41,378	1,730,511	Passengers	3,385,600. 577,337 24,435 69,626 462,231	4,509,229.
•	Toll Rate	7%4	Aver. \$1.66 50¢ Aver. 74¢	:  :	Toll Rate	10¢ 735¢ 10¢ 10¢ Com. rate	] :  :
	and Revenue of the Year 1936 and Estimated for 1937, as Developed from the Company's Records  1936  Number of  Toll Rate Vehicles Revenue Toll Rate Vehicles Revenue  Commute Rate 79,666 18,521.60 Com. Rate 86,897 22.75	3,309.00	\$215,309.44 17,024.05 9,884.66	\$242,218.15.	Revenue	\$275,407.70 35,556.85 1,688.50 5,679.50 27,711.71	<b>\$346,043.26</b> <b>\$1,306,191.01</b>
•	1936 and Estin 1936 . Number of Vehicles 1,160,165 79,666	. 1-	131,531 53,077 18,493	1,467,052	Passengers	2,754,077 474,078 16,885 56,795	4,097,995
<i>5</i> <sup>4</sup>	rnue of the Year I Tell Rate 60¢ Commute Rate	1%1	Aver. \$1.64 50¢ Aver. 51¢ Aver. 53¢	1	Toll Rate	10¢ 735¢ 10¢ 10¢ 10¢ Commute Rate	1:11
	Traffic Over Carquines Bridge, and Rever Automobiles:  Cash.  Commute.		(Including Freight Revenue) Stages Miscellaneous	Total. Total for Vehicles	Passengers:	Auto, Stage, Truck & Misc. Stages Charge. Trucks Charge. Commute	Total for Passengers. Grand Total

				1			
[fol. 445]  Estimate of Traffic and Revenue over Carquines Bridge, Applying Revised Rate Structure of 50¢ for Auto, with Driver and Passengers not  Exceeding Four, 5¢ for All Other Passengers		Decresse under	Structure \$37,706.50	255, 236, 30 10,086, 70	2,839.75	\$318,563.45	
ver an	* .*		3.50	.28	2,839.75		
Du			Revenue 1858, 393. 50	.085	28	633	888
o, with		Rates	88. B			\$809,663 318,563	\$6,880,000 7.14%
or Aut	; . ·.	Proposed Rates	Rate 50¢	- 10 IC	01010		9
ucture of 50¢ for seengers	le raffic	Pro	Number 1,316,787	201,714	16,885		
levised Rate Str or All Other Pa	Assuming 2.2 passengers per automobile Arsuming 13.5% increase in automobile traffic Year 1936	Rates.	Revenue \$696,099.00	266, 236.30	1,688.50 5,679.50		
Pour, 5¢ f	2 passenge % increase Yea	Under Existing Rates	Rate 60¢	104	100		
nes Bridge, / Exceeding	Assuming 2. uming 13.59	Unde	Number 1,160,165	2,552,363	16,885	Available for return under existing rate structure. Decreases under proposed rate structure.	Available for return under proposed rate structure. Investment. Bate of return under proposed rate structure.
Sarqui	Ass		, :			tal Available for return under existing rate Decreases under proposed rate structure	pused rate
over (						er exis	er pro
enne						n und	n und
I Rev			. :	isc.	: : :	retur der pi	n und
ic and	**			ks, M		le for	le for nent retur
Traff	*		E	True	500	J. zilab	Available for Investment Bate of retur
45]			Item nobiles.	Auto	Stages (Charge) Stages (Charge) Trucks (Charge)	Total. Avai Decr	AEB
[fol. 445] Estimate	* *		Item Automobiles	488	0001		. /

[fol. 446]

Estimate of Traffic and Revenue over Carquines Bridge, Applying Revised Rate Structure of 50¢ for Auto, with Driver and Passengers Not Exceeding Four, 5¢ for All Other Passengers

Assuming 2.2 passengers per automobile
Assuming 13.5% increase in automobile traffic

Year 1937

	Onder	Under Existing Rates	Kates	£ .	Proposed Kates	lates	Decrease under	
Automobiles Parameter	Number 1,424,331	Rate 60¢	Revenue \$854,598.60	Number 1,616,616	Rate 50¢	Revenue \$808,308.00	Structure \$46,290.60	
Auto Blages, Trucks, Misc. Blages (Charge) Blages (Charge) Trucks (Charge)	3,133,528 252,072 577,337 24,435 69,626	100 200	313,352,80 25,207.20 43,300.27 2,443.50 6,962.60	253,072 577,337 24,435 69,626	00000	12,603.60 28,866.85 1,221.75 3,481.30	313,352.80 12,603.60 14,433.42 1,221.76 0,481.30	
Total Available for return under existing rate structure. Decreases under proposed rate structure. Available for return under proposed rate structure	ate structure. ture. rate structure				\$961 391	\$961,174 391,383 \$569,791	\$391,383.47	

Investment
Rate of return under proposed rate structure...

[fol. 447] Before the Board of Supervisors of the County of Contra Costa, State of California

In the Matter of the Application of Rodeo-Vallejo Ferry Company, a Corporation, for Authority to Erect, Construct and Maintain a Toll Bridge and Take Tolls Thereon Across the Straits of Carquinez Between Contra Costa County and Solano County, California

#### Ordinance No. 171

An Ordinance Granting the Application of Rodeo-Vallejo Ferry Company, a Corporation, and Franchise to Erect, Construct and Maintain a Toll Bridge Across the Straits of Carquinez, Between the County of Contra Costa and County of Solano, State of California, and Take Tolls Thereon.

The board of supervisors of the county of Contra Costa,

State of California, do ordain as follows:

That the Rodeo-Vallejo Ferry Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the town of Rodeo, county of Contra Costa, State of California, having made its duly verified application in writing in due form of law to the board of supervisors of the county of Contra Costa for authority to erect; construct and maintain a toll bridge with the right; privilege, and permission to take tolls thereon across the Straits of Carquinez between the county of Contra Costa and the county of Solano, in the State of California, as described in the application of Rodeo-Vallejo Ferry Company, a corporation, therefor; and

Whereas, the county of Contra Costa, is the county on the left bank descending of the Straits of Carquinez, the body of water or stream across which it is proposed to erect,

construct and maintain said bridge; and,

Whereas, this board has jurisdiction to hear and act

upon said application, and,

Whereas, the board of supervisors of the county of Contra Costa, on the sixth day of November, 1922, proceeded to hear and did hear the application of said Rodeo-Vallejo Ferry Company, a corporation, and continued the further hearing thereon from time to time and until the eighth day of January, 1923, and said board of supervisors on

said eighth day of January, 1922, all members thereof being present, duly passed and adopted a resolution expressing its desire to great the privilege, permission and frachise to the Rodes-Vallejo Ferry Company, a corporation its successors and assigns, to erect, construct and maintain a toll bridge across the Straits of Carquinez, between the county of Contra Costa and the county of Solano, in the [fol. 448] State of California, and having found and determined therein the precise point where such bridge is proposed to be located in the manner prescribed by law, and this honorable board having thereupon notified W. F. Me-Clure, state engineer of the State of California, of such purpose and the precise point where such bridge is proposed to be located, and duly and regularly continued the further hearing of said application and the hearing thereon to this fifth day of February, 1922, and said engineer having in accordance with law designated the length of the spans necessary to permit the free flow of water in said Straits of Caroninez, there being no draw in said bridge. and having filed in writing his designation as aforesaid, with the board of supervisors in pursuance of law on this fifth day of February, 1922.

And now on this fifth day of February, 1923, it fully appearing to the satisfaction of this board that due proof has been made that due and legal notice of said application of said Rodes-Valleio Ferry Company, a corporation, for the right and franchise to so effect, construct and maintain a toll bridge across said straits and to take tolls thereon and the time and place fixed for the hearing thereof and thereon has been made and given in all things in the manner and for the time prescribed by law, and this board having in open and regular session duly considered said application for such franchise and permission to take tolls thereon now determines and finds that the application of said Rodes-Vallejo Ferry Company, a corporation, is in all things as required by law, and that due and legal notice of said application has been given in manner prescribed by law and that this beard has jurisdiction to hear and act upon said application and grant said franchise.

That said toll bridge across said straits prayed for in said application of said Bodeo-Vallejo Ferry Company, a corporation, between the points and at the location determined by this board, is a public necessity. That the expense of the erection, construction and maintenance of such a toll bridge as a free public highway is in the opinion of the board and this board so determines and finds too great to justify the erection, construction and maintenance there if by the counties of Contra Costa and Solano.

That said bridge is a public necessity. That in the opinion of the board the public good and interests require the construction of said bridge. That the public good and public necessity will be promoted by the erection, construction and maintenance of said bridge as proposed by the said Rodeo-Vallejo Ferry Company, a corporation.

That said Rodeo-Vallejo Ferry Company is the owner of lands in Contra Costa County, California, hereinafter particularly described upon which the southern terminal of said

bridge is to be located.

[fol. 449] That the bridge as proposed to be erected by the Rodeo-Vallejo Ferry Company, a corporation, is of such type that it will not interfere with or obstruct navigation and will allow sufficient space or span to permit the safe, expeditions and convenient passage at all times of all vessels which may navigate said straits.

That there is no toll bridge at the proposed location nor

is there any bridge whatever across said straits.

That there is no ferry operating across said Straits of Carquinez within a mile of the site of the proposed bridge, save and except that of said Rodeo-Vallejo Ferry Company.

a corporation.

Thereupon, it is by the board of supervisors of the county of Contra Costa, State of California, ordered, that said bridge is a public necessity; that the public good and interests require the construction thereof; that the public good and interests and public necessity will be promoted by the erection, construction and maintenance of said bridge.

That said bridge is to be erected, constructed and maintained in a straight line across the Straits of Carquinez, between the county of Contra Costa and the county of Solano, State of California, between the terminal points

or location hereinafter described;

That the said application of the Rodeo-Vallejo Ferry Company, a corporation, is hereby granted, and the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns, is hereby granted the rights, privilege, permission,

authority and franchise to erect, construct and maintain a toll bridge with the right to take tolls thereon across the Straits of Carquinez, between the county of Contra Costa and the county of Solano, State of California, in a straight line between the terminal points hereinafter particularly described, with the proper approaches thereto, for the term of twenty-five (25) years, from and after the effective date of the ordinance granting said franchise.

It is hereby ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the coun-

ties of Contra Costa and Solano.

Said bridge is to be constructed of concrete and steel and is to be of the suspension type or such other type as the War Department of the United States in its judgment may prescribe. It shall be of a height of one hundred thirty-five (135) feet in the clear above mean high water on said straits, at all points between the southerly proposed new pierhead line as hereafter described and the next pier north of said line. The breadth of said roadway of the said bridge shall be not less than thirty (30) feet; said bridge shall be constructed in all things in accordance with the requirements of the United States War Department. No pier of said bridge nor any portion thereof nor any other obstruction below said 135 feet clearance shall be placed in the Straits of Carquinez, between a straight line drawn from the northwest corner of the California and [fol. 450] Hawaiian Sugar Refining Corporation's wharf and the northeast corner of Selby whaft (said line being the proposed new pierhead line to be established by the proper authorities of the United States) and a point one thousand (1000) feet northerly from said line.

That the location of the Contra Costa County terminal

of said bridge is as follows:

Portion of Location No. 229, the State Tidelands, Contra Costa County, lying within the southeast quarter of section 31, township 3 north, range 3 west, M. D. B. and M.,

and more particularly described as follows, to wit:

Beginning at a point on the southerly side of the Straits of Carquinez 14.36 chains north of the southeast corner of section 31, township 3 north, range 3 west, Mount Diablo meridian in the line of extreme low; thence south 5.07 chains to a station in the United States bulkhead line; thence north 89° 17′ west, running along said bulkhead line 5.57 chains to station; thence north 4.70 chains to station.

tion in low water line; thence north 87° east, 5.58 chains into the place of beginning, run by the true meridian, magnetic variation 17° 05′ east, containing 2.71 acres.

Also on that certain roadway situate in said county and state aforesaid and more particularly described as fol-

lows, to wit:

Commencing at a point where the center line of First Avenue, town of Valona, Contra Costa County, intersects the southerly shore of Carquinez Straits in southerly line of Tideland Survey No. 44, C. C. Co., thence north 760 feet more or less, crossing the lands of the Northern Railway Co. and lands formerly owned by Mrs. Muir and the State of California, to the line of the tract of 2.71 acres above described. The above described line is the center line of a 40-foot roadway.

That the location of the Solano County terminal of said

bridge is as follows:

On that certain tract of land situate, lying and being in the county of Solano, State of California, and known as the James Clyne tract, located in the north half of section 32, and the south half of section 29, in township 3 north, range 3 west, M. D. B. and M., which said tract of land lies between the lands of the Pinole Dome Oil Company on the east and the lands of Antonio dos Reis and the lands of the Great Western Power Company in the west, and

more particularly described as follows, to wit:

Beginning at the point of intersection of the line of mean high water on the north shore of Carquinez Straits with the westerly line of the James Clyne tract in section 32, township 3 north, range 3 west, M. D. B. and M. (if the public land surveys of the United States be considered extended over said land) and running thence northerly along said westerly line of the James Clyne tract, 600 [fol. 451] feet to a point on said line; thence east 350 feet; thence south 550 feet more or less, to said line of mean high water on the north shore of Carquinez Straits; and thence westerly along said line of mean high water to the point of beginning.

The precise point on the above described locations where such bridge is to be located is as indicated on sheet 2 accompanying report of W. F. McClure, state engineer of the State of California, and dated February 1, 1923, and filed with the board of supervisors of Contra Costa County

on the fifth day of February, 1923, reference to which is hereby made as a part hereof, and is particularly described as follows, to wit:

The bridge axis or center line is fixed by a straight line passing through the two following points:

- 1. Point P, which is the intersection of the bridge axis with the property line between James Clyne and the Great Western Power Company on the Solano shore. This point P is 410 feet from a point marked Q and measured along the boundary between the James Clyne property and that of the Great Western Power Company. This line bears south 32° west. The point Q is the intersection corner common to the properties of James Clyne, the Great Western Power Company and Manuel and Antonio dos Reis.
- 2. Point R, shown on sheet 2 on the Contra Costa side along the front property line of the Rodeo-Vallejo Ferry Company, which line bears north 87° east, the point R is 120 feet westerly along this line from the northeast corner of the Rodeo-Vallejo Ferry Company's property location 229, 2.71 acres; this northeast corner of the ferry company's property is 14.36 chains north of the intersection point common to sections 5, 6, 31 and 32.

That a penal bond be given by the Rodeo-Vallejo Ferry Company, a corporation, for the benefit of the county and all persons crossing or desiring to cross said bridge, in the sum of twenty-five thousand (25,000) dollars, conditioned as required by law, said bond to be given at least ten days before the operation of said bridge and the taking of tolls thereon.

That the Rodeo-Vallejo Ferry Company, a corporation, give bond in the county of Contra Costa, in the sum of fifty thousand (50,000) dollars, guaranteeing the faithful performance of all the terms and provisions of the ordinance grating franchise herein, said bond to be given within thirty days after the ordinance granting this franchise becomes effective, said bond not to be effective until after the approval of said bridge and franchise by the War Department of the United States.

That the license tax to be paid by the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns, for taking tolls on said bridge shall be one hundred (100) dollars per month, payable annually, commencing from

Rate

date of the operation of said bridge. That two (2%) per cent of the gross receipts derived from the use and opera-[fol. 452] tion of said bridge shall also and in addition be paid to the county of Contra Costa, for the benefit of the counties of Contra Costa and Solano for the use of said franchise.

The actual construction of said bridge in good faith, shall be started within four months from the date of this ordinance granting said franchise and shall be completed within three years thereafter, or such further time as may be granted by the board of supervisors.

It is further ordered that the rate of tolls which may be collected for crossing said bridge shall be as fixed by the Railroad Commission of the State of California, and that in the event said Railroad Commission shall fail to fix such tolls then it is hereby further ordered that the rate of tolls which may be collected for crossing said bridge shall be as follows:

Automobiles

# Ambulances, self propelled or horse drawn \$0.75 Automobiles .75 Automobile passenger busses 1.50 Bicycles Bicycles Bicycle, accompanied by owner, each .25 Carts and Wagons Cart or wagon without horse .75 Push carts (attendant and freight extra) each .25 Commercial or Delivery Automobiles and Motor Trucks

#### Ditchers, Harvesters, etc.

Ditchers, harvesters, steam rollers, tractors, and all similar conveyances, machines, and vehicles charged on a basis of weight, per ton of 2000 lbs. at carrier's convenience per ton

Not exceeding two tons capacity, each

Exceeding two tons capacity, each .....

1.60

1.00

1.50

### Cattle and Stock

10		
10-	Cattle, per head, and stock in herds and uncrated, including one attendant each	.50
	Sheep and swine uncrated and in herds, including one attendant each	.35
	[fol. 453] Commutation Rates	
	Motor stages operated daily over a fixed route (minimum charge per day \$10.00 per trip, includes driver but no passengers)	\$0.50
	Daily round trip for automobiles and driver, per	
	month	25.00
	Freight	
•	Freight of all kinds on vehicles, per 1000 lbs. (minimum charge 20 cents)	.40
•	Hearses	
	Hearses, self propelled or horsedrawn (with or without casket and corpse)	1.25
	Horses	
	Hora and wagon or cart, or pleasure vehicle Two horses and wagon, or pleasure vehicle	1.00
	Two horses and dray, or truck, or commercial ve-	
	One horse or draft animal, not attached to vehicle,	1.75
	each	.50
	Each horse over two attached to vehicle; each	.50
	Motorcycles -	
	Motorcycles, each	.25
	Motorcycles, with side car, each	.50
0.0	Trailers	8
	Two-wheel trailers attached to automobiles.  Four-wheel trailers attached to automobiles or	.50
· 0-	trucks (camping equipment in trailers charged as freight)	.75

## Passengers Rate Passengers, drivers of vehicles and pedestrians, one way .15 Passengers, drivers of vehicles and pedestrians, round trip .25

#### Commutation Rates

Passengers,	drivers	of vehicles	and pedestrians, per	
month				3.00

Said bridge shall be constructed in accordance with the requirements of the United States War Department.

It is further ordered that this ordinance be published before the expiration of fifteen days after the passage thereof, together with the names of the members of the [fols. 454-455] board voting for and against the same, for at least one week in the Contra Costa Gazette, a new spaper printed and published in the county of Contra Costa.

This ordinance shall become effective thirty days from

and after its passage.

The foregoing ordinance was adopted this fifth day of February, 1923, by the following vote:

Ayes: Supervisors Zeb Knott, C. H. Hayden, W. J. Buchanan and R. J. Trembath.

Noes: Supervisors-None.

Absent Supervisor J. P. Casey.

W. J. Buchanan, Chairman of the Board of Supervisors of the County of Contra Costa. (Seal of Board of Supervisors.)

Attest: J. H. Wells, Clerk of Board of Supervisors.

[fol. 456] A. This exhibit generally deals with the operating conditions of the Carquinez Bridge, as we see them, and goes into traffic, revenue, expenses, and projects traffic into the future and also finally deals with the rate structure which we think can be supported to the effect that the present rate of 60 cents per automobile and 10 cents per passenger can be reduced to 50 cents per automobile, driver and passengers up to 5.

Q. Have you arrived at any conclusion as to what would be the revenues for the year 1938 at existing toll rates, or

will you take that up later?

A. I have not made that calculation. The figures are available to make it. I have made the calculation on the other set-up, but I think that would be a good figure to develop in this record. However, it has not been worked up in this report.

Q. Now, as to your depreciation expense allowance which for the year 1933 is in the amount of a little more than \$200,000, you have stated that is a 6 per cent sinking fund

annuity. What life is used?

A. The life within the limits of the franchise granted there, of 25 years, expiring in 1948. Of course, in figuring that you have to take out of that 25-year period the time that was consumed in building the bridge, some 3 years, but that is merely a calculation of 6 per cent interest for that known amount, the estimated cost, deducting the construction period.

• Q. You say the estimated cost. What is the amount of your depreciable base to which that annuity is applied?

A. That is \$6,880,000.

Q. And it would be practically a 23-year life, is that correct?

A. That is approximately correct.

A. For 1937 it is estimated that the Company earned 6.78 per cent on their investment; 1928, 4.62; 1929, 7.79; 1930, 8.82; 1931, 7.69; 1932, 5.72; 1933, 4.96 per cent; 1934, 5.48; 1935, 5.90; 1936, 8.52 per cent, and with the two months of 1937 projected, 10.21 per cent.

Q. Now, I take it that the income taxes which you have in this table are the actual taxes paid and allocated to the

Carquinez bridge?

A. That is correct. The Company actually pays its Federal income tax on the combination of the two bridges.

Q. What is the basis of allocation?

A. The basis of the allocation—I stand corrected if I am not right in this—Mr. Coleman gave the figure, I believe—in on their relative earning position.

Q. The relative revenues from the two bridges?

A. That is correct.

Mr. Coleman: I don't believe they segregated the income tax that way. The income tax is set up on their books at

one figure and is not apportioned between the two bridges.

A. I stand corrected. I was not sure on that.

Q. It might be well, Mr. Hunter, to explain the rate of charge applied to trucks.

A. Trucks under 3000 pounds take a rate of 60 cents;

trucks between 3000 and 6000 take a rate of 80 cents.

Q. That is the truck and the freight, is that correct?

A. That is the truck alone. There is another charge for the freight. Trucks between 6000 and 9000 take a rate of \$1.30, and I don't know whether I gave from 6000 to 9000—oh, strike that. Trucks from 6000 to 9000 the rate is [fol. 458] \$1. Trucks over 9000 it is \$1.30. These other items, for instance, trailers, 2-wheel, attached to an auto, 25 cents; 4-wheel trailer takes a rate of 50 cents; freight on vehicles takes a rate of 30 cents per ton. Various other vehicles are classed in the next group, such as ditchers, harvesters, tractors, road rollers, and so forth, take a rate of \$1.50. I might finish these rates. The commute rate for passengers on foot or in vehicle is \$2 per calendar month. The commute rate for an automobile and one, per calendar month, \$17.50. Now, in addition to the rates on trucks that I have given you there is a commute rate set up in their tariff varying from \$21 per month to \$51 per month, that is, per calendar month. In addition to these rates there are other special rates for the Federal Government, of which the PWA is one.

Turning now to the next table shown on page 12, the purpose of that table is to show the results of our estimates between what would obtain under the prevailing rates of. the Company, the Carquinez Bridge, during 1936, as compared to what would result from the condition if the rate of 50 cents per automobile and driver and up to 5 passengers had been in effect. Now, I might at this time comment a little upon this question of this automobile fare. In looking over the rates for the various bridges I think the most outstanding difference between the rates for the Carquinez Bridge and other bridges, the major bridges, is the rate that obtains for automobiles and passengers. As you know, the rates on the San Francisco-Oakland Bay Bridge are 50 cents per automobile with passengers up to [fol. 459] 5, which is the same rate as the Golden Gate Bridge. In the case of the Dumbarton Bridge the rate is 40 cents for an automobile.

Q. Including passengers?

A. Excluding passengers. The passengers are 5 cents. In the case of the San Mateo Bridge the rate for automobile and passengers up to 7 is 65 cents, and over 7 is 5 cents. And in the case of the Carquinez Bridge, as I have stated, it is 60 cents and 10 cents for each passenger. In looking over the rate structures as between these various bridges it seems as though the truck rate and the freight rate do not have the same outstanding differences as obtains in the case of the automobile and passengers. For that reason it was thought desirable to apply against this Company's operation the results that would obtain if the automobile and passenger rate were brought down to a level with the rates now in effect on the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge. Now, it does not mean that that is the only adjustment that might be made. We could have gone ahead and made other rate studies but we have made this study, which we think is most appropriate, and I think one that should be seriously considered. not permitted of a great many other studies that might have been employed.

With that statement I will turn to this table shown on page 12. Now, that applies to the year 1936 and that is based upon the assumption that there are 2.2 persons per automobile on the average. That average is just slightly greater than was obtained in our origin and destination check which resulted in a rate of 2.17 persons per automobile. But we decided to use 2.2 as it seemed to be a [fol. 460] fair and reasonable figure to employ in this case. It is also based upon the assumption that with this lesser rate in effect there will be an increase in travel over that bridge in amount of 131/2 per cent. Now, that 131/2 per cent is arrived at by studying the traffic that passed over that bridge during the 2 days that we made the origin and destination check which Mr. Hall has introduced. And applying to those various groups what we thought was a reasonable' allowance in each case, we come out with a sum total of 13½ per cent increase with this rate. That, obviously, is a judgment figure. Basing the table on those two factors, we will take the automobiles that actually passed over the bridge in 1936, amounting to 1,160,165, at 60 cents, which produces a revenue of \$696,099. Now, if we assume that if the 50-cent rate is put into effect and the traffic will increase by 131/2 per cent, we will get a result of 1,316,787 vehicles, and at 50 cents that amounts to \$658,393.50. That shows a difference of \$37,705. In other words, the bridge's revenues would have been decreased by that amount under the assumptions we have made.

Mr. Rowell: Have you formed any conclusion, Mr. Hunter, as to the propriety of the use of the sinking fund annuity with an undepreciated rate base in this case?

A. I would recommend that that method of determining depreciation be employed. It seems to me that it is fair and equitable to all parties. If the sinking fund method is employed the investor, in turn, gets his money back, the traffic as it goes along pays an equal amount, and it seems to me that that method of setting up depreciation is the most [fol. 461] equitable one and, as I understand it, the one generally followed by the Commission, except that consideration is given to the straight line method also.

Q. Have you reached any conclusion as to the deprecia-

tion rate in determining the annuity?

A. That depreciation rate is pretty severe, I would say, particularly in the experience we have just had in the last few years. It would be difficult to invest money at 6 per cent interest. However, the Company, as I understand it, has been buying up its bonds. These bonds pay something between 5 and 6 per cent. And the Company itself employs the 6 per cent sinking fund method, with that added feature that I explained this morning, that they add to that the accumulated interest, the interest on the accumulated fund.

Q. Then I understand you to conclude that if the Company is able to invest its depreciation reserve in its own bonds and obtain thereby the saving or earning of 6 per cent or more, it would be reasonable to take the 6 per cent annuity rate?

A. If they can do that, yes.

Q. Have you reached any conclusion as to the period over which the depreciation should be set aside? I notice you

have a 25-year life and other lives in your table here.

A. Well, I think unfortunately for the traffic that now has to pay the tolls over that bridge, the life is very short; that is, that investment must be amortized over a period of much less than the expected life of that bridge. If that could be lengthened out in keeping with the life of that bridge it would make a material difference, as these curves show, and that was the primary reason for presenting those [fol. 462] curves on these different bases. But we, in our

calculation studies, have used the short life as laid down in the franchise.

#### F. COLEMAN, recalled.

Direct examination resumed:

Mr. Rowell: I believe you have been sworn before, Mr. Coleman?

A. Yes.

Q. Have you prepared any further material for introduction as an exhibit in this proceeding to supplement your

Exhibit 1 introduced at the last hearing?

A. Yes. My first exhibit, Exhibit No. 1, included a balance sheet as of August 31, 1937, and income accounts up to August 31, 1937. Since that time I have brought those figures up to date and have prepared a balance sheet as of October 31, 1937; income accounts for the 10 months' periods ending October 31, 1936, and 1937, and for the 12 months ending October 31, 1937, and detailed statements of the revenues and expenses broken down to the two bridges for the last three 12-months' periods.

Mr. Rowell: I suggest that material be received in evidence and given an exhibit number.

Commissioner Riley: If no objection that will be received as Exhibit No. 21 by the Commission.

Q. Mr. Coleman, if you were to treat the investment made . by the holders of bonds and the holders of stock of the American Toll Bridge Company as a wasting asset, to be returned over the remaining franchise life, would a decreased net revenue as estimated by Mr. Hunter be sufficient to so amortize the investment of the bondholders and stock-[fol. 463] holders plus, after the payment of all expenses of operation, over that period?

A. I would conclude the revenue would be sufficient to do that.

- Q. Could you amplify that statement and tell us how you would approach this rate-making problem from that point of view?
- A. Exhibit No. 21 shows the bonds outstanding in the total principal amount of \$3,491,500.

Q. Will you refer to the page?

A. It is the first two pages of the exhibit. The first page, the statement of assets, shows a deposit designated "Retirement fund, first 51/2's, of \$126,000." That money presumably has been appropriated to retire bonds. The last quotation I saw on these bonds was 991/2 asked, from which I could assume that, if necessary, the Company with \$126,000 in cash could retire approximately \$126,000 of bonds. That would leave a net figure representing the bonds of \$3,365,-500. The Company's stock is shown on this balance sheet as \$5,000,000, less treasury stock of \$1,280,407, leaving net stock outstanding, par value, \$3,719,593. I have considered that stock at par. The balance sheet also shows current assets of \$512,046.29; prepaid expenses, a total item of \$127,-348; and on the other side, current liabilities, \$51,397.03; prepaid rentals, \$61,174.80; 2 per cent gross earnings tax unpaid amounting to \$261,282. Those amounts, I understand, are in dispute, there is litigation affecting them, and I don't know whether the Company eventually will have to pay the amount or not. It shows Federal income tax still unpaid of \$16,555 and employed' redemption funds and miscellaneous items of \$25,120. Now, the Company also has on [fol. 464] hand certain stocks of other companies, the Martinez-Benicia Ferry and Transportation Company and the Rodeo-Vallejo Ferry Company. I have the balance sheet of the Rodeo-Vallejo Ferry Company as of August 31, 1937, which shows a net book value of its assets, excluding intercompany accounts, of \$80,125. The Martinez-Benicia Ferry Company's balance sheet shows a net book value of \$85,281. Now, the Company has certain lands which will not revert to the counties upon termination of its franchises. Those lands are carried on the books, so I figure it, at \$57,053. Now, the total current assets I have just enumerated and these book values of these stocks of the subsidiary companies and the book value of the non-operative land, you might say, aggregates \$861,853. Deducting from that the current liabilities I just enumerated and deducting that figure in turn from the capital stock outstanding would leave a balance of \$3,273,220 which would represent, so it seems to me, the amount of the stockholders' interest that must be paid off before the expiration of the franchise.

Now, the annual income necessary to pay off the bonds and to pay the interest on the bonds I have figured will total, over the remaining life of the bonds, \$4,214,983. That figure

includes the redemption of bonds at the call prices specfied in the trust indenture plus the annual interest payment necessary on the principal amount of the bonds. Dividing that total figure by 10 years, which is approximately the nmaining life of the francisise, would result in an angul charge necessary to redsem the bonds and pay the intenst of \$421,698. Now, that figure of \$2,272,220 which I design [fol. 465] noted as the net interest of the stockholder to be amortised over the next 10 years, plus a dividend, first st an assumed rate of 8 per cent annually, using the present value totals, would amount to \$487,806. The operating expenses of the Company for the 12 months ending October 31, 1937, excluding depositation, considering only the cash expenses, come to \$356,901. I have estimated income taxe necessary on this basis at \$30,000, and a reduction in the 2 per cent gross revenue tax by reason of decreased earings, of \$6,000, which would make total cash requirements of the Company, \$1,288,365.

Now, the company receives from various other companies, for pipe line privileges, and so forth, annually \$6,022. I estimate that of the dividends it will pay on it stock it will get back from the holding company, by reason of the fact that the operatory company owns the stock of the holding company, an annual amount of \$35,000. This would leave a balance of \$1,367,163 necessary to be raised from bridge tolls. Exhibit 5 shows total operating revenues from bridge tolls, both bridges, of \$1,606,056, which figure is \$428,000 in excess of the amount I just developed as the amount neces-

sary to be raised from bridge talk.

Q. Just a minute, I believe you have those figures typed, have you not?

A. Yes.

Q. Have you them in such shape that they could be introduced as an exhibit and handed to the parties?

A. Yes, they are.

Mr. Rowell: I will ask that that material be received as the next exhibit.

[fol. 465] Commissioner Riley: If there is no objection, that will be received as Commission's Exhibit No. 22.

(Here follows Exhibit No. 22-page 1.)

#### Соминания Ехипит 22

American Toll Bridge Company

#### Estimated Cash Requirements

(Carquines and Antioch Brid	ges)	
1 Book existending Oct. 31, 1937	\$3,600,000	
\		
Ton towary beads	108,500	
- misses find	126,000	
Balance		\$3,365,500
1 Bod estatuation	\$3.719.593	40,000,000
All other liabilities	30,120,000	
Current	51,347	
Prepaid rentals	61,175	*
2% gross revenue tax unpaid (Litigation)	261,282	
Federal income tax	16,556	
Employees' retirement, etc	25,120	
Bib total	84 125 072	
Debet manage	41,100,010	*
Current saucts		
Prepaid expenses		
Book values:		
Rodso Vallejo Ferry,		
Aug. 31, 1937 80,125		2
Martines Benicia Ferry,		-
Dec. 31, 1936 85,281		
Non-bridge lands, Oct. 31, 1937 57,063	861,853	
Balapee		\$3,273,220
Annal income necessary		
Bond interest at 51/2% and bond retirement		
(Arge for 10 ym.)	421,498	* .
To amortine \$3,273,220 in 10 yrs. plus 8%		*
andly	487,806	
Operating expenses	356,901	
Income tax	30,000	
Les reduction in 2% tax	(8,000)	
Total requirements		\$1,288,205
houses of revenue		
Bests for use of bridge	6,022	
Proportion of A. T. Co. of Calif. income	35,000	
Bridge talls	1,247,183	
Total sources of income		\$1,288,205
Bridge tolls-12 mos. ending Oct. 31, 1937		1,676,056
hide talls above tabulation		1,247,183
		1
Balance		\$428,873
• • •		7120,010

[fol. 468] Q. Have you anything to add, Mr. Coleman? Or, I might ask you this, what have you to say as to the propriety of assuming the stock to have a value equal to its per value of \$1 per share?

A. It is difficult, or I might say impossible, to obtain the amounts actually contributed in the first instance by stockholders of this Company, due to the fact that a large portion of the stock was distributed by the holding company acting on behalf of the operating company. If you will recollect, in Exhibit 1 I pointed out that some shares of stock were sold by the holding company. Those shares in the first instance came on the operating company's books at a figure of \$1.60 a share. I have reason to believe those shares originally were sold for \$2 a share. Whether or not that differential of 40 cents a share, representing commissions paid to the salesmen, got onto the operating company's books I don't know. It was not clear from the operating company's books and I didn't have access to the holding company's booksthey were in Delaware. Further, the original books of the Company failed to include descriptions of some of the entries and as to certain items on those books I was unable to determine whether or not the assets or items that came onto the Company's books really represented consideration received from the sale of the stock.

Now, if you will turn to page 16 of Exhibit 1, I developed the total there, presumably representing proceeds from the sale of the stock, of \$3,493,228.59. Incidentally, in typing the exhibit there was an error there and that figure should be changed to \$3,393,228.59. As I stated, I am not satisfied that figure represents the total proceeds received. How-[fol. 469] ever, the fact remains that at the outset some stock was sold at a premium of \$1 per share. Other stock issued to the holding company in exchange for assets—was issued in exchange for assets which originally were set up at a figure of \$10,000,000. That figure subsequently was written down to some \$600,000, the write-down being charged against the premium paid by those who paid cash for their stock. In other words, as time went on the Company, through adjustments and otherwise, used up this premium some stockholders paid, so that at the present time, according to its books; the stock stands there at par with no allowance for either premium or discount on stock appearing on the books. For that reason I have taken the stock at par.

Q. Well then, the par value of the stock would approximately represent, in your opinion, the net proceeds received from the issuance of the stock, is that correct?

A. It would represent the net proceeds now set up on the books of the Company, you might say. In other words, as they adjusted the proceeds from the sale of the stock they concurrently adjusted the assets of the other side, so that if you take the par value of the stock plus the net proceeds received from the initial sale of bonds, plus amounts originally borrowed from the Rodeo-Vallejo Ferry Company, the total of those three items will be approximately the total reported investment at this time in the fixed assets of the Company.

[fol. 470] Mr. Thelen: Well then, I will call Mr. Mitchell.

#### STEWART MITCHELL, recalled.

#### Cross-examination:

Mr. Thelen: Mr. Mitchell, in outlining your earlier connections with matters relating to the Carquinez Bridge, I understood you to testify that you had had a hand in the preparation of a report which was prepared in 1929 by the California Highway Commission for submission to the Legislature; that is correct, is it not?

A. That is correct.

Q. And as I understand it, Mr. Mitchell, this was a report that related to various toll bridges in California, including the Carquinez Bridge and the Antioch Bridge?

A. Yes, sir.

Q. As I understand it also, you did quite a little of the work in connection with that report?

A. That is correct.

Q. Then in so far as the Carquinez Bridge and the Antioch Bridge are concerned, you actually did a good deal of the work shown in this report, didn't you?

A. That is right.

Q. It is a fact, is it not, that that report was transmitted by C. H. Purcell, the State Highway Engineer, to Mr. E. B. Meek, then Director of the Department of Public Works, and then transmitted by Bert Meek to the California Highway Commission?

A. That is right.

Q. Now, in that report, Mr. Mitchell, you considered both the Carquinez Bridge and the Antioch Bridge, did you not?

A. Yes.

Q. And then, as I understand the matter, you proceeded to determine the present value of the investment in the Carquinez Bridge?

A. Yes.

Q. And it is a fact, is it not, that at that time [fol. 471] you reported as follows-I will now read from page 67 of the report-

"Combining the value of the stock with the funds necessary to retire the bonds and not considering the Antioch Bridge, we arrive at the amount required to take over the Carquinez Bridge at the present time, which is \$10.676.142."

And that statement represented your judgment as to that amount at that time, did it not?

A. Yes.

Q. And then it is true, is it not, that the report continued in the next paragraph-

A. May I qualified that?

Q. Yes, certainly.

A. That is our judgment from the stockholders' viewpoint.

Q. Yes, from the stockholders' viewpoint. It was not, however, from the viewpoint of the State, for instance, if it should desire to purchase the bridge?

A. No; we have taken up other values later on.

Q. Then the report continues, does it not, on the same page,

"This sum may be considered an estimate of the present value of the Carquinez Bridge from the stockholders' point of view, assuming that the Antioch Bridge had not been built or acquired."

A. That is correct.

Q. And then later on you proceed, do you not, somewhere. in this report to determine the value of the combined bridges, that is, the value of the Carquinez Bridge and the [fol. 472] Antioch Bridge, taking them together, from that same point of view, on page 70 perhaps?

A. That is the Antioch Bridge on page 70.

Q. Yes. You determined then, did you not, on page 71, the value of the combined bridges from that point of view!

A. That is correct. Q. What was that value that you there found?

Q. I take it that you have no doubt at this time as to the question of the accuracy of those figures on the bases on which you prepared them at that time?

A. That is correct, with the information that was avail-

able at that time.

Q. And at that time, as I understand it, Mr. Mitchell, you had access, did you not, to the records of the Toll Bridge Company?

A. In that case we are just quoting, of course, what the securities were shown at and what the market value and

the other statistics of record at that time.

Q. That is, the statistics of the American Toll Bridge Company?

A. Hes.

Q. Now, I understand that a number of years later, Mr. Mitchell, you had a very important part in connection with another report which is known as the report of October 20, 1932, entitled "Report on Investigation of Carquinez Toll Birdge"?

A. That is right.

Q. That report was transmitted, was it not, by Mr. C. H. Purcell, State Highway Engineer, to Earl Lee Kelly, Director of Public Works, on October 21, 1932?

A. That is right.

Q. And then transmitted by Mr. Kelly to the Governor on the same day?

A. Yes, sir.

[fol. 473]. Q. I understood you to testify the other day that as to that report, "I made a further report on the Carquinez Bridge myself in 1932". I take it from that that this report is very largely your own work?

A. That is right, that is correct.

Q. Would you tell us, please, just what part you played

in the preparation of that report?

A. The details of preparing the report were practically all under my direction in that case, subject, of course, to the approval of Mr. Purcell and my immediate superior, the bridge engineer.

Q. You don't happen to have a copy of that report here,

do you?

Q. Well, we can use it together, I think. That report states on page 8 as follows:

"Attention is again called to the fact that the American Toll Bridge Company owns and operates as one project both the Carquinez and Antioch Toll Bridges and it is, therefore, necessary to consider the future earning power of the two-bridges in order to arrive at a reasonable price for which the stockholders of that Company could dispose of the Carquinez Bridge alone."

That statement is correct, is it?

A. Yes. I might point out, of course, in both of these reports we are considering the purchase, that is, the price, of the bridge, and not, of course, the rate base.

Q. You were trying to find out what would be a fair pur-

chase price for those bridges, as I take it?

A. Yes.

Q. In fact, following up that very matter, it is said,

"A fair purchase price based upon its earning power is the only one that is acceptable for a property of this kind [fol. 474] which has no intrinsic value other than potential earnings."

And further on the same page you say, do you not,

"This report will, therefore, deal primarily with the data and means of arriving at the estimated value based on probable future earnings"?

A. That is correct. Of course, the fundamental idea back of that report was that the two sides could not agree on the selling price or purchase price unless they both considered what they were liable to get out of the investment if they continued with it and, on the other hand, if they sold it, what they could put their money out at to bring in a profitable return.

Q. Certainly.

A. No other side was considered in that report.

Q. Then continuing on page 37 you stated, did you not,

"It must be recognized that those who initiated and developed a project such as these toll bridges are entitled to be rewarded for their foresight and for the risk they have taken. The public, having held off until the results are more or less assured, must expect to pay for the pioneering of others."

You still believe that, do you not?

A. I don't think there is any question about that.

Q. Then, as I understand it, Mr. Mitchell, you report on page 38 of this report the total amount which the stockholders would expect to receive in return for their interest in the property, do you not?

A. Yes.

Q. And would you kinely read for the record what your

conclusions were on that subject?

[fol. 475] A. This purchase value, which is the one adduced on the assumptions that are previously brought out in the report and amounts to \$11,032,140, covers the interest of the stockholders in both the Carquinez Bridge and the Antioch Bridge. The final step is to determine at what price they may be expected to give us their interest in the Carquinez Bridge and still operate the Antioch Bridge.

Q. And you have some figures then, have you not, in fine print near the top of page 38; would you mind reading those,

or if you prefer I will read them?

A. The figures I refer to are the total amount which the stockholders would expect to receive in return for their interest in the property, therefore, is as follows: Net value of common stock after deducting fixed charges (present worth of future earnings on an 8 per cent interest basis), \$5,162,900; retirement of existing bonds at call price, first mortgage at 1021/2, \$3,843,750; second mortgage at 105, \$1,470,000; present worth of required payments to amortize bond discount and expense, \$555,490. Total fair purchase value, the sum of those figures, \$11,032,140. Of course, I would like to call attention to the fact that in that report there are certain assumptions made as to a fair rate of return and other things like that, that were purely put in there to show more what the problem was rather than to say that would be the correct value because, as I pointed out, this is a matter that took considerable more study than wewere able to give it and the whole report is mainly to point out how this value should be arrived at, rather than to state. those figures were the only ones to be taken. Of course, the public naturally takes the figures that you put down, regard-[fol. 476] less of what you say about it.

Q. You didn't use any assumptions that you thurse unfair, did you?

A. At that time we thought they were roughly what was

reasonable.

Q. You would not have consciously assumed anything that

you thought wasn't fair or just, of course?

A. No, not at all; of course, there was still a problem which we assumed we could not settle, to say whether 7 per cent was a fair return or 8 per cent, or a matter of that kind, and so we had to assume certain figures, of course.

Q. As I understand you, Mr. Mitchell, you then reported a total fair purchase value for both bridges of \$11,032,000!

A. Yes.

Q. Would that also include the Antioch?

A. That is correct—that is, the Company's earnings from

the bridge property.

Q. Later on you deducted an amount for the Antioch Bridge so as to get finally to the net purchase price of the

Carquinez Bridge!

A. That is right; we wanted to show that the stockholders, if they retained the Antioch Bridge without—made it pay for itself, that they would be willing to let the Carquine Bridge go for this particular amount.

Q. And then the amount which you finally reported as the net purchase price of the Carquinez Bridge was \$10,288,840!

A. That is correct.

Q. Going back a minute now, Mr. Mitchell, to the 1932 figure, I assume what you were trying to do was to get an estimate which would be fair to the public and to the State, as well as the Company?

A. That is what we were seeking for, yes,

[fol. 477] Q. As I understand it, you are permanently in the employ of the Department of Public Works?

A. Yes, sir.

Q. And were loaned by the Department to the Railroad Commission for the purpose of the present proceeding!

A. That is right.

Q. Certainly. Now, in your report which is Exhibit 3 in the present proceeding, as I understand it, you reported that the amount of money which was actually expended by the Company on the Carquinez Bridge, as shown by the books of that Company, was \$7,863,451.17?

A. Yes.

Q. Now, what I wanted to know is this: You haven't any doubt that the Company actually expended that much money, have you, Mr. Mitchell, whether they might have done it wisely or not?

A. I am not questioning the validity of those charges.

Q. Yes. That is what I thought.

A. In my report.

Q. And you haven't any doubt, have you, that the Company, in spending that money, paid it out in good faith?

A. Not at all.

Q. And you haven't any doubt, have you, that the Company, when it paid out that money, paid it out because it thought it was necessary to do so at the time?

A. That is true.

Q. Now, I would like to read a sentence, Mr. Mitchell, from the letter of transmittal which appears on page 1 of your report. It is in the first paragraph, the last sentence, reading as follows: "In order to obtain a suitable standard by which to measure the reasonableness of book costs, I have estimated the cost of construction based on the assumption that sufficient finances were available from the beginning to [fol. 478] permit the letting of all major items of work to contract by competitive bids." Now, as a matter of fact, Mr. Mitchell, that assumption, unfortunately, is contrary to the actual facts as they then existed, is it not?

A. That is correct.

Q. As a matter of fact, the Company could not get enough money under the conditions which then existed so as to have enough available from the beginning to permit the letting of all the major items to contract by competitive bidding?

A. As I so stated in the report.

Q. As a matter of fact, in the actual construction of the Carquinez Bridge, Mr. Mitchell, it was necessary, was it not, for the Company to secure practically \$1,000,000 from sources such as sale of stock and earnings of the ferry and the personal fortunes of the promoters, before they were able to sell any of their bonds?

A. Yes, that is correct.

Q. That is the way it actually worked out in practice, is

A. Yes.

Q. In this same sentence, Mr. Mitchell, you state that you have assumed that sufficient finances were available from

the beginning. What did you mean when you used the word "beginning" in that sentence?

A. That is, from the very start of construction.

Q. And at what time did you assume that would be!

A. I assumed that would be, as I later stated in the report, the construction period of two and a half years, which would be two and a half years before the date of opening on May 21, 1927.

Q. About November 30, 1924?

A. Yes.

[fol. 479] Q. And you assumed in your report that how much money would be available in November, 1924?

A. Well, the fact, as stated in the report submitted today under interest during construction, I have assumed the entire amount to be raised by a bond issue at that time so that there would always be sufficient money on hand to pay on the contracts as the money became due.

Q. Do you believe, as a practical matter, Mr. Mitchell, that it would have been possible for this Company in constructing the Carquinez Bridge and the Antioch Bridge to get all their money from the sale of bonds and have it all available at a certain date without having received any money from other sources such as stock or personal fortunes?

A. Under the circumstances, it was not—would not have been possible, no.

Q. You have assumed, as I take it, what one might call

a somewhat ideal condition, have you not?

A. I have assumed the only condition whereby you could determine certain definite construction costs, those costs that anybody could consider reasonable, so far as they go, at least.

Q. But these ideal conditions, unfortunately, did not exist, did they?

A. No—well, I wouldn't say ideal conditions; I might say if the bridge was being built by a going concern, say the Southern Pacific, for instance—not the State, because in the case of the State, of course, there would be certain deductions from my costs here—but I had to have some premise on which to base construction prices used in this report and I pointed out in the report that those conditions did not actually exist so far as actual construction of the bridge was concerned.

[fol. 480] Q. Of course, what you have assumed is quite far from the facts as they actually existed?

A. Yes.

Q. As a matter of fact, your plate No. 2 shows quite clearly and in an interesting way, does it not, a substantial amount of actual construction work done some little time before November 19, 1924?

A. Yes, it shows a great deal of delay throughout the

work due to lack of finances, as I pointed out.

Q. It shows actual construction work being started on the job in April, 1923?

A. Yes, that is stated in my report.

Q. It is a fact, is it not, that work of promotion, engineering and other preliminary work started back in September of 1922?

A. I have a report on preliminary investigation construction work starting April, 1923. I don't know at this time about any previous work, but it is not important, I guess.

Q. As a matter of fact, Mr. Mitchell, have you had occasion to know that the chief engineer was appointed as early

as September, 1922?

A. I know from discussion with those who were interested in it at the time that the first thought went back to 1918, as far as that goes, and considerable discussion had.

Q. As far as engineering work and the actual promotion work and all of that are concerned, it antedated April,

1923, by quite a number of months, did it not?

A. It is very likely, yes.

Q. Now, as a matter of fact, Mr. Mitchell, do you know the date on which the franchise was issued for the construction of the Carquinez Bridge?

A. Yes; on February 5, 1923.

[fol. 481] Q. February 5, 1923. That franchise provided that the work of actual construction should start within 4 months, did it not?

A. Yes, I believe that was the terms of the franchise.

Q. Then if your construction work had not started until-November 30, 1924, it is quite obvious that the Company would not have complied with the provisions of its franchise?

A. Oh, no doubt about that.

- Q. And the franchise, therefore, would have been void, would it not?
  - A. That is correct.

- Q. Did you in your assumption assume that the necessary War Department permit had been acquired by November 30, 1924?
  - A. I didn't take that into consideration.

Q. You say you did not?

A. No, I did not.

Q. It was necessary, however, was it not, to secure a permit from the War Department before the construction work started?

A. Yes.

Q. You know, don't you, that there was considerable opposition before the War Department to the issuance of these permits?

A. I know there was a great deal of objection, of course.

Q: And that necessarily took time to work the thing out, didn't it?

A. That is correct.

Q. But you didn't take that particular matter into consideration in your assumptions?

A. No.

Q. Referring a moment to the question of the opposition, Mr. Mitchell, there was opposition, was there not, to the original granting of the franchise by the Board of Supervisors of Contra Costa County?

A. I understand, and I think it is shown in the original [fol. 482] report, that there were certain other companies seeking a franchise at the same time for a bridge across the

Straits at various locations nearby.

Q. As a matter of fact, you show in your 1929 report, do you not, Mr. Mitchell, that the Dillon Point Development Company applied for a franchise on September 14, 1922, from Dillon Point to Eckley; and another company, known as the San Francisco Transit Company, applied both on September 14, 1922, and March 5, 1923, for a franchise between the same points?

A. Yes, sir.

Q. And that -nother company, known as the Crockett Land & Cattle Company, made application on March 5, 1923, for a franchise for a bridge from a point near Crockett to a point near the Great Western Power Company's bridge!

A. Yes.

Q. And, as though those troubles weren't sufficient, a little later, on July 27, 1926, the Northern California Development Association presented an initiative petition to the Board of Supervisors, and they denied it, and then the matter was taken by the company to the Supreme Court before they could get it cleared out of the way?

A. Yes, there is no doubt all these questions came up.

The history was obtained at that time.

Q. Isn't it true, Mr. Mitchell, referring again to the question of opposition, that this Company had visited upon it a very strenuous and effective opposition from the navigation companies?

A. I understand that is true, too.

Q. Well now, Mr. Mitchell, in view of all the opposition of these various types, do you believe people would have been willing to supply all the necessary money by the sale [fol. 483] of bonds without any underlying stock money or any other money, but would just come in and supply all the money from the sale of bonds?

A. No, I have never presumed that at all.

Q. As a matter of fact, you know that it could not have been worked that way?

A. No, under the circumstances, it was impossible, of

course.

Q. I would like now, Mr. Mitchell, to refer to your recapitulation on page 27 of your report. As I understand it, Mr. Mitchell, from that recapitulation, you accept without challenge a number of the items shown in the Company's books?

A. Yes.

Q. As having been spent. And among those items, as I understand it, is an item for superstructure amounting to \$2,822,498.87?

A. Yes; that work was let to contract by competitive bids, and our estimate seemed to come so close to it I recom-

mended using the original figure.

Q. You accept also, do you not, the cost as shown on the Company's books for toll house amounting to \$17,092.37?

A. Yes, we had no means of checking that, and it is a small item, and we assumed it to be correct.

Q. You also accept the cost shown on the books in the sum of \$35/322.70 for approach work?

A. Yes, we accept that for the same reason.

Q. All right, I understand also, Mr. Mitchell, you accept what you believe to be the book costs for the presently existing fender?

A Tes

Q. On the other hand, I understand that you challenge a number of items of which the first and the largest is the item for more and foundations?

A. That is correct.

Q. Then a relatively small item of \$11,460.76 for other

A Tes

[fol. 484] Q. And I understand also you do not make allowance for what you call the temporary or the initial fender!

A No.

Q. And also that you challenge the costs shown under the head of various overheads?

A. That is carrect.

Q. Well, suppose we consider those in turn, then, one after the other.

Q. I understand, however, as to the next two contracts, Mr. Mitchell, you do have question concerning them—the Duncauson & Harvellson contract of \$655,580.36, and the Raymond Concerns Pile Company contract for pier foundations amounting to \$120,023.52?

A. These are the major contracts which occurred in the

Q. Well, suppose we analyze those two contracts a little and see just the facts were in connection with them. As to Duncauson & Harrelison, that was a well known and responsible contracting from here in San Francisco, was it not?

A Yes

Q. In cases of that kind, Mr. Mitchell, aren't contracts frequently let on a case plus basis for the very reason that I have stated?

A Of course, that would not apply to any recent jobs, because in most cases they are handled by corporations or public bodies which are able to make a pretty thorough exploration to start with before the contracts are let, so that the purely exploratory work would be on a cost plus basis but not the construction work.

Q. This work done by Duncanson & Harrellson, to which

we are referring, Mr. Mitchell, did include a substantial amount of exploration work, did it not?

[fol. 485] A. Yes, the books show \$42,000 for explora-

tion work.

Q. And as I understand it, you do not challenge that part of the money paid to the Duncanson & Harrellson people?

A. No.

Q. It is simply the remaining cost?

A. I am not directly challenging any of their work or their reliability or anything else. It is only quite evident, of course, from the progress chart covering the period of time they were engaged in the work that there was considerable stopping and starting. In other words, I assume that delay was due to lack of finances at the time, that they probably had to stop and start as the money was available. And as I pointed out in my report, it is a well known fact that a rather major extra cost resulted from these particular delays. From the progress chart, which is page 14 in my Exhibit No. 3, you will notice in connection with Pier No. 4 that they drove a cofferdam and there was some delay between that and the time they started to work on the excavation, again some delay on the pile driving werk and then a long delay before they poured the tremie seal, and then there was a long delay between the time that the tremie seal was poured before the company was able to finance the remainder of the project and let the contract to the American Bridge Company to repair that pier, and that is the time during which the teredo worked on the wood piles of the cofferdam and practically ruined them. I am not saying it was not good engineering to use untreated piles, because if the work had been able to be carried right through they would have been as satisfactory as anything else; but it is evident from the records and from the general observation of the conditions that there [fol. 486] was a large extra cost due to that fact which, of course, doesn't show up in my estimated costs of construction.

Q. Now, isn't it a fact, Mr. Mitchell, that it was this work which the Duncanson & Harrellson Company did under considerable difficulty that made it possible in the month of April, 1925, to finance the job to completion by the sale of bonds and to have contracts entered into with the Missouri Valley Bridge & Iron Company to complete the

foundation work and with the United States Steel Prod-

ucts Company to put up the superstructure?

A. I understand, of course it was impossible to raise the finances through the bond issue until the Company had expended a considerable portion of its own money and gone far enough to show that the work was more or less tested.

Q. Mr. Mitchell, are you prepared at this time to testify that, under the circumstances as they actually existed and considering the amount of work actually done by Duncanson & Harrellson and considering also that their "plus" was only 6 per cent instead of the usual 10 per cent, that they were overpaid for what they did?

A. 6 per cent is a fair return, I understand.

Q. Well, do you believe under all the circumstances, that Duncanson & Harrellson were everpaid for what they

actually did?

A. I don't think that is the question at issue at all; they probably earned all they got, as far as that is concerned. [fol. 487] Mr. Thelen: Mr. Mitchell, I believe that we had left for consideration among the major contracts yesterday afternoon the Raymond Concrete Pile Company, the contract covering pier foundations.

A. Yes, sir.

Q. If you will kindly turn to page 13 of your report, you show in connection with that contract a cost of \$110,023.52, do you not?

A. Yes.

Q. As a matter of fact, of that amount, \$60,023.52, being all of it except \$50,000, was spent, was it not, in actual construction work on piers 6, 7 and 8, I believe?

A. Yes.

Q. And were you in your investigations able to find the actual detailed statement on which that payment was made?

A. No, I didn't have that available.

Q. Well, assuming, Mr. Mitchell, that a detailed statement itemizing that sum of \$60,023.52 was submitted by the Raymond Concrete Pile Company to the American Toll Bridge Company on April 10, 1925, and that the Company, after examining the detailed statement, honored the amount shown and issued two checks to the Raymond Concrete Pile Company totaling \$60,023.52, would you be inclined to criticize the amount which was paid on those detailed statements?

A. Well, I have not, of course, gone into any such detail as that. It was impossible for me to check those things item by item. I could not even make a statement on that.

Q. Are you advised, Mr. Mitchell, that of that sum of \$60,023.52, all except \$1200 was paid by the Raymond Concrete Pile Company to the Missouri Valley Bridge & Iron Company, the sub-contractor who had actually done that work?

A. No, I had no record of it.

[fol. 488] Q. You don't know that all of that money was paid to them and that of that money the Raymond Concrete Pile people kept for themselves only \$1200? You didn't know that?

A. No, I have no details of the contract.

Q. And having no details, of course, I would imagine you would not challenge the item because you don't know the detailed facts?

A. No, I am not challenging any of those individual items. Q.-Now, as to the \$50,000 which was paid to the Raymond Concrete Pile Company in addition to the amount we have been just considering, do you know what that was paid for?

A. No, only in a very general way, as I mention in the report. The records of the Company stated it was in

settlement of a suit or claim.

Q. Well, if it should appear, Mr. Mitchell, that this amount was paid in settlement of a claim of the Raymond Concrete Pile Company and that, among the other items of that claim, was an item for engineering services performed by the Company throughout the period of 4 months in connection with the plans and specifications, and also an item for bringing the Missouri Valley Bridge & Iron Company, the ultimate contractor, into the picture; also an item for bringing two bonding houses into the picture. which later were instrumental in the purchase of the bonds; also an item of compensation for breach of contract as to which the Raymond Concrete Pile Company claimed something in excess of \$850,000 damages for breach of that contract-bearing in mind all those items, would you be inclined to question the amount of the settlement which was finally reached, of \$50,000?

A. No, I am not questioning any of the details of the

actual cost in my report at all.

[fol. 489] Q. The Raymond Concrete Pile Company is a very responsible contractor, is it not?

A. Yes.

Q. Has been engaged in deep water construction in various portions of the United States, has it not?

A.. Yes.

Q. In fact, it is one of the largest contracting concerns in the United States engaged in that line of work, isn't it?

A. One of the largest, yes.

Q. Now, Mr. Mitchell, I would be obliged to you if you would refer to your Table II on pages 17 to 19. In that table you estimate, do you not, what you believe would be a reasonable cost of constructing the piers and foundations of the Carquinez Bridge?

A. Yes.

Q. Now, Mr. Mitchell, let us go a little more in detail into this Pier 4. What allowance did you make for the driving of guide piles, guides?

A. I considered that the general prices allowed there would cover that amount of work. In other words, lumped

it in.

Q. Guides, the item of guides includes material, doesn't

it, plus the driving of those guides?

A. I think the amount of material, though, is small in comparison with what you have to estimate for the rest of the factors of piling and waling.

Q. It is a fact, then, that you made no specific and par-

ticular allowance for the guides?

A. I added a percentage to the other items of piling, the quantities that I figured would cover any miscellaneous items like that.

Q. What was the percentage which you thus added?

A. I haven't got the figures now, the exact amount I figured on that.

[fol. 490] Q. Then, as a matter of fact, Mr. Mitchell, the prices here used by you are bid prices, are they?

A. Yes.

Q. And a bid price is not necessarily an actual price at all, is it? That is, a bid price is not necessarily the cost, is it?

A. The sum of the bid prices would be actually the cost, ves.

Q. Isn't it true the bid prices may be either above or below the cost of doing the work?

A. It can be unbalanced, of course; but here we tried to allocate the thing in reasonable proportion to each item as it should be allocated.

Q Is your estimate an estimate of cost, or is it merely

an addition of bid prices?

A. It might be both; it is an estimate of cost, certainly.

Q. Well, which is it, I am asking you?

A. An estimate of cost.

Q. As I understand it, Mr. Mitchell, there is no specific allowance for working platform contained in your estimate?

A. That is true.

Q. How much did you allow in your estimate for brace piles in the cofferdam?

A. I don't know just what you are referring to specifically

in that case.

Q. Well, did you or did you not make allowance for brace

piles for bracing the cofferdam?

A. You require, of course, guide poles and interior waling and bracing, no question about that. It has been allowed for in here, yes.

Q. My question was, how much did you allow for the

brace piles?

A. They are included in the cost of waling.

Q. Did you make any separate allowance for the brace piles!

A. No, all lumped together.

Q. You say they are included in the cost of waling. How [fol. 491] much of the cost of waling represents the cost of the material and the labor or installation of these brace piles?

A. I couldn't say at this time.

- Q. How much did you allow for the anchorage of the cofferdam?
- A. There is no specific allowance made for the anchoring of the cofferdam, that is not covered by the cost of general expense.

Q. Such anchorage would be necessary, would it not?

A. A certain amount would be, yes.

Q. But if it is here anywhere, it is under this general expense item, is that right?

A. Yes.

Q. How much do you think would be a proper allowance to be included in general expense for anchorage of the cofferdam?

A. I couldn't say at this time, I haven't the detailed

figures to go into it.

Q. How much did you allow in your estimate for the rental of the pile driver or drivers used in connection with the construction of that cofferdam?

A. Well, I might answer all these items by simply saying that we did take all we could get on that subject and lumped it together to determine what, in a general way, is a fair expense for general expenses; and I can't say it is reflected in here in any other way.

Q. Mr. Mitchell, did you ever have experience in the State of California in driving a cofferdam on a job that is com-

parable to Pier No. 41

A. Well, I believe the work on the Klamath River is somewhat comparable.

Q. That is in Oregon, is it?

A. No, in California.

Q. What was your part in connection with that job?

A. I was resident engineer on the work.

[fol. 492] Q. That was the job which later culminated in a lawsuit, was it not?

A. Yes.

Q. There was considerable difficulty, was there not, that developed in connection with the construction of that job!

A. That is correct.

Q. How large a cofferdam was installed in connection with that job, Mr. Mitchell?

A. As I recall, about 40 by 30 feet, something of that

order.

Q. That was a very much smaller cofferdam than that installed in connection with Pier No. 4, was it not?

A. Yes, it was smaller

Q. Is that the only experience which you have had, either as contractor or as supervising engineer; in connection with the installation of a large cofferdam.

A. Well, I believe none larger than that in my own experience. There are several in Oregon of a similar nature.

Q. I notice here you used a cost of \$60 per thousand for board measure. Do you know whether or not, as a matter of fact, that was the going rate in this vicinity at that time!

A. No, I have no specific information on that.

Q. Isn't it a fact that the going rate at that time was \$85 per thousand delivered at ship's tackle?

A. I haven't got that information.

Q. Well, do you happen to remember where you got your \$60.

A. I took it from various prices that the State had for smilar work at the time.

Q. Where was that other work?

A. I couldn't say now; it was just put down as I got it, the prices obtained by the design department at that time for lumber in this vicinity.

[fol. 493] Q. How much did you include for struts in con-

nection with that particular item?

A. I haven't the details between the wales and the struts; it is all lumped together here.

Q. What allowance did you make for uprights and for

bracing ?

A. Well, it presumably includes all the uprights, struts and wales, but I haven't the details of how much each one was.

Q. Then I take it prior to the time when you prepared this estimate you have given me, you never made the type of estimate which a contractor would make in deciding whether

or not he would bid on the job?

A. Yes, I believe that is the way this estimate was made. In other words, we are not trying to follow out the thing intorically, only in a general way, that is, to tie in with the time of construction and under the assumptions made in this report. But we did study the general costs and the cost of plant and equipment and we have proportioned it over the costs as a contractor would do in making up an estimate.

Q. Don't you believe the contractor, in preparing to bid on a job like this, Mr. Mitchell, would have to consider all these individual items unless he were going to make a very

fatal bid?

A. He would consider the items, yes, and we have considered them in what we figure is the general allowance for the entire sub-structure.

Q. But I take it you are unable at this time to state what consideration in dollars you did give to these various items?

A. No. We could submit that more in detail if you want.

Q. I am asking you what you did in connection with the preparation of your exhibit; I am not asking you to go to [fol. 494] further work in order to submit those details.

I simply want to know what you actually did in connection with the preparation of this exhibit, Mr. Mitchell.

A. Yes, we did go into all the various items of the general plant, equipment, and so forth, as far as we could determine them historically and tried—from that we tried to determine a fair allowance for general charges to spread over the individual items.

Q. In connection with cofferdam bracing, what allowance do you make for hardware, including plates, angles, castings, and so forth and so forth?

A. I figured that would be included in the price of the

timber.

Q. Included in the price of the timber?

A. Yes.

Q. How would you estimage the cost of hardware, how much should be included in connection with the bracing of that cofferdam?

A. I would not like to say that at this time, as I haven't the details there, again.

Q. Would you say an allowance of 170,600 pounds would be out of the way?

A. It seems to be a little bit high but I could not determine at this time.

Q. How much did you consider to be proper when you prepared your estimate?

A. I couldn't tell you that, either; I haven't those figures.

Q. How much did you allow for back-filling around the pier after completion?

A. We didn't allow anything for that.

Q. Now, as to this item of unwatering and pumping, \$400. that is rather a major item in connection with a cofferdam, is it not?

A. It very often is; depends on the tightness, of course, of the cofferdam.

[fol. 495] Q. Isn't it true that your item of \$9,200 is absolutely inadequate to cover all of these various items which you are now putting under that head?

A. It may be low with regard to this particular job, but the 20 per cent, I think, is fair enough for the entire job.

Q. I imagine you had no allowance for the submarine diver in connection with cleaning the edges of Pier 4?

A. We had nothing specific for that, no.

- Q. In fact, you have no allowance for the wages of any diver at all in connection with Pier 4, have you?
  - A. No.
- Q. Isn't it a fact, Mr. Mitchell, that the allowance for the power bill alone in connection with that item of unwatering and pumping would be likely to run up to approximately that \$400?
  - A. How much?
  - Q. \$400.
  - A. Quite possible, yes.
- Q. Then this allowance of \$400, if I correctly understand you, Mr. Mitchell, did not include anything for the installation and removal of the power lines, transformers and pumps and the wages of pump men working 24 hours a day, that is, in shifts, but the operation being 24 hours a day, or for the labor of handling suctions, the expense of actual replacement of suction hose and foot valves, insurance on labor or incidental costs?
  - A. No.
- Q. Where in your estimate could we find all of these items?
- A. Again I refer you to the general allowance for general expenses.
  - Q. That is in this item of \$9,200?
- A. 20 per cent which is allocated to this is \$9,200, but as I say, it is a general expense of 20 per cent spread over all that in that proportion to all the other items.
- [fol. 496] Q. I note you have an item of \$5,500 for overbead and profit in connection with this cofferdam; does that include any allowance for contingencies?
  - A. Yes.
- Q. How much?

A. In general we have allowed 15 per cent for overhead and profit and on the end, after we had totaled up the entire sub-structure, we added 5 per cent again for contingencies.

- Q. As a matter of fact, when it comes to the item of premium on surety bond, you did not, in making this estimate, follow the practice, usual practice, of showing that item as a different sum at the end of the estimate.
  - A. Not in this estimate as it is gotten up here, no.
- Q. How much did you allow for the layer of crushed rock on the bottom so as to prevent the concrete from mixing with the mud or clay at the bottom?

A. I don't believe we have allowed for that in this cas Mr. Thelen: I should like to turn now to piers 6, 7 at 8 as shown on page 19 of your Exhibit 3. There were 1 footings, were there not, involved in those piers?

A. Yes, they are so marked that way.

Q. As I understand it, you have allowed \$1 per cub yard for the excavation?

A. Yes.

Q. As a matter of fact, Mr. Mitchell—of course, you we not there at the time of the construction, we e you?

A. Naturally not, no.

Q. In connection with piers 6 to 8, inclusive, did you assume or not assume that it was necessary to erect a conferdam around each of those footings?

A. I presume it would be necessary to erect some coffe

dam around there, yes.

[fol. 497] Q. As a matter of fact, that is the way the work was actually done, was it not?

A. I have no direct evidence, but I assume it would

done that way.

Q. How much, in your judgment, would be a reasonable cost for the installation and subsequent removal of the cofferdams in connection with these particular piers?

A. I would have to look again at the size of the piers. believe those piers are about 15 by 20, or such a matter and I see now we assumed that the cost of the concrete that case would cover the general cost of the cofferdam.

Q. Did you ever hear of the cost of a cofferdam bein

included in the lump sum price for concrete?

A. Oh, yes, quite frequently—either in that or in the excavation—quite often is the practice.

Q. How much did you allow for cofferdam in this case 12 cofferdams, the installation and removal?

A. I can't answer that now here.

Q. Would you assume that a figure of \$10,000 would reasonable for those 12 cofferdams, for the installation are removal?

A. Well, it could be that, though I would hate to confir

that without making some figures.

Q. If that were the case and if that item were included in this cost of concrete, there would only be \$5,790 lefor every other item that goes in a the concrete, would there not?

A. Yes, that would be correct.

Q. In other words, with these other items you have cut the cost of concrete down to about \$5 per cubic yard. Would that be a reasonable price?

A. No, that would be too low if that is the case.

Q. As a matter of fact, Mr. Mitchell, isn't it a fact that [fol. 498] you did not include anything for the cost of installation and removal of those cofferdams in your estimates as to 6 to 8, inclusive?

A. Well, it appears to be slightly low for those piers themselves, that is, that price; I couldn't say whether it was not included in the bid price for all of those items all the way through. The other piers, the concrete is somewhat

higher in proportion.

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Q. Coming back to concrete for piers 6 and 8, it is perfectly obvious, isn't it, that that price of \$14 either can not include the \$10,000 cofferdams, or it is way low for the materials and all the other items that enter into the concrete?

A. On these particular piers, yes.

Q. Of course, you would yourself desire that the necessary correction be made there?

A. Not without taking into account that maybe we are low on some of the other costs where the \$14 was used.

Q. Well, if you find any of those as we go along I would like you to draw my attention to them. These particular piers, 6, 7 and 8, had to be back-filled and the false work and the sheet piles removed?

A. I don't know as we took into account the matter of whether they had to be back-filled—don't believe we did.

Q. How much did you allow for the anchorage in connection with these particular piers?

A. We didn't allow anything specifically for anchors in that case.

Q. How much did you allow for the rental of the pile driving equipment?

A. Again, it gets back to the placing of a certain allowance for general expenses into the cost of the concrete.

Q. Is that also in the concrete?

A. Yes, in the \$14 price.

[fol. 499] Q. I think you didn't understand the question, ir. Mitchell. I asked how many dollars you allowed for cofferdam in connection with the price which you did give for concrete?

A. I can't tell you those figures.

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Q. How much did you allow for de-watering and for keeping the water sut?

A. We chan't make a separate estimate of that for this pier, either.

Q. In your figure for execution how much did you allow for ground swell?

A. I believe the unit prices shown here are sufficient to cover the cost of all those thems.

Q. I understand then the answer is that no specific allowance was made?

A. No specific allowance.

Q. How much did you allow for the blanket of crushedrock or gravel over the area to keep the concrete free from much!

A. No specific allowance.

Q. How much did you allow for removing the false work!

A. No specific allowance.

Q. How much for bracing of the cofferdam and removing

A All of these stems carried the same thing, the general cost of collections, and no further comment to make other than they are covered as I stated before.

Q. How long did you assume the piles to be which sup-

ported the piers, and of what diameter?

A. I don't believe we went into the details of the diameter of piles: we assumed reasonable average cost for driving that many lineal feet of piles.

Q. How much did you allow for the diversion of the

[fol. 500] the Bay at the site of Pier 5?

A. We had no data and we didn't consider it.

Q. No allowance made for that?

A. Ya. didn't know anything about it,

Q. How much did you allow for the demolition of part of the sid approach and visiting of the ferry at this point?

A. Now allowance for that.

Q. Now he was an easy one. Suppose we go to Pier I, you assume to be the character of the material was encavated at that point?

A. I believe it is rather rucky, if I recall.

Q. Refer was nather an isolated job over on the Sulano County share.

A. I presume at that time that it was.

Q. Now, in your opinion, would \$1 per cubic yard be a sufficient price under those conditions?

A. Yes, because we took it that the material could be de-

posited right over the side practically.

Q. Isn't it a fact that that \$1 per cubic yard was just a general average that you secured and then that you applied that to the various excavations in connection with the various piers?

A. Yes, that is correct, based on an average of several

onditions.

Q. And that is irrespective of the conditions which might govern at the particular piers as to the question of excavation?

A. Yes, that is correct; there might be a slight difference

at that pier.

Q. Please tell me what is included in your item of \$14 for concrete in the piers in connection with Pier 2? In other

[fol. 501] words, please break down for me!

A. That is the same as before. We allowed an estimate for the removal portion of the cofferdam to allow your concrete to be poured in the dry, and therefore, it is an average price for the job.

Q. Mr. Mitchell, will you please listen to my question and I would appreciate a direct answer if I may. Will you please break down your answer of \$14 into the various constituent items and tell me what the items are and how much

is allowed for each item?

A. I beg your pardon, I thought that had been done before at the beginning. We allowed for the cost of materials in the concrete, \$6.80 a yard, and the total cost of the mix at the delivery point at the pier, \$8.60. Then other items covering the handling and placing, overhead and general charges, contingencies and profit, without any cost of forms, brings the cost up to \$13. That we considered a fair price for tremie concrete after comparing it with other similar bids on large work. And in the case of the pier shaft, a slight reduction in the handling and placing, and the cost of form work, brought it up to the total of \$14.

Q. You had a general item there for handling and placing,

werheads, contractor's profit and what other items?

A. Overhead and general charges would be 20 per cent, and contingencies and profit 15 per cent.

Q. How much did you allow for the cost of the construc-

A. The construction wharf we allowed in the general charges and in the unit prices.

A. No definite amount.

Q. Where is it, though?

A. In the general charges and the unit bids for jobs of that kind.

[fol. 502] Q. Now, as to general charges, there is only one place where you have a general charge?

A. Yes.

Q. That is 20 per cent in connection with Pier 4 so that is aside. Now, you say it is allowed somewhere in unit prices. Where in the unit prices is it allowed, and how much is it, and let me put my finger on it so I can find it, please!

A. We didn't go into the details of the method or what wharves would ever be necessary in the cost of these caissons. We simply estimated the unit price based on similar

work elsewhere.

Q. How much in any unit price anywhere did you include

for the construction of those construction wharves?

A. I couldn't state definitely. As I say, in building up these prices we have allowed this 20 per cent for general charges, which would include general work of building wharves and whatever was necessary in the handling of the job.

Q. If the books of the Company should show that for construction wharf, addition to wharf and trestles, an actual expenditure of \$84,390 was made, would you be inclined to

accept that cost?

A. I would accept it—it is quite possible for that item that it is correct. I would not want to add it to my costs, though.

Mr. Thelen: Have you your Exhibit 3 Before you, Mr.

Mitchell?

A. Yes, sir.

Q. Will you please turn to page 13. Referring now to the subject of riprap, Mr. Mitchell, I observe on page 13 of the Commission's Exhibit No. 3 an item under date of July 9, 1926, "Healy-Tibbitts Company, rock filling (riprap), \$39,361.92". Do you know how many tons are included in that item?

[fol. 503] A. Note xactly; we tried to find that cut as best I could from the records, and the best I could do, I believe, is outlined in the report. We had a record of about 83 cents a ton being paid, and on that basis we backed it up and I believe got about—well, there was a certain amount of riprap which we assumed to be the amount, to which we added the price for placing that amount. Now, that was the best I could get from the Company records.

Q. Well, can you give us any fairly accurate figure of how many tons of riprap were purchased in connection with that

transaction?

A. I believe I finally just accepted that \$39,362 and showed it that way on page 19 as actual expense by Company records.

Q. Then you don't know how many tons were purchased

in connection with that transaction?

A. No, I have very little detail as to that figure.

Q. Do you know when that particular riprap was placed?

A. That is somewhat indefinite, too; I believe we had an item, or at least a note in the diaries, of placing riprap at the end of 1926 and I assumed that was what it referred to.

Q. Then was it your idea that all the riprap under that

contract was placed toward the end of 1926?

A. Yes.

Q. I notice on that same page 13, Mr. Mitchell, an item under date of March 19, 1928, "Healy-Tibbitts Company, furnish rock for fill at fender, 75 cents per ton". Do you know how much riprap was supplied under that contract?

A. I said in the report the exact amount of rock placed could not be obtained at this time but it was stated in the annual report to the stockholders dated April 2, 1929, to amount to 150,000 tons approximately.

[fol. 504] Q. That was an approximate figure, was it not?

A. An approximate figure.

Q. Have you any other basis for using that figure of 150,-000 tons?

A. I checked the thing approximately with Mr. Jennings, who worked on the bridge at the time, and while I had nothing definite from him, he seemed to think it was something of the order of the amount of work, but I had no definite figures by which to check it.

Q. That would be as of the date of the stockholders' re-

port, which was April 20, 1929?

A. Yes.

Q. Have you any record of the amount of riprap installed after the date of that report?

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A. No, I have not.

Q. Now, how many dollars did you allow for the lighting system on the bridge, both temporary and permanent?

A. I assumed that that was included in the item of tell house and buildings and took that as the figure as shown in the books.

Q. Is it customary, M. Mitchell, to include, for instance, beacon lighting to supply protection to airplanes under the head of a toll house?

A. We didn't find any other item that covered it. It was my intention to use the actual figures for it and not to estimate that, and if there is anything in the books that we have overlooked on that, why, it should have been included.

Q. Do I understand that whatever amount you have allowed for lighting system is included either under toll house

or under buildings?

A. Yes, that is the only item we had.

Q Suppose it should appear, Mr. Mitchell, that the lighting system alone cost in excess of \$10,000, would you think it proper to include it in your \$17,000 item for toll houses [fol. 505] or in the small item you have for buildings?

A. Yes-I mean it would be correct, of course, to modify

the total to include that.

Q. The item you have allowed for toll houses and buildings would not be sufficient to include any such item as \$10,000 for lighting system, would it?

A. As I say, if it could be shown that book figures did

not include all those items, it would be modified.

Q. How many dollars did you allow for protective devices against fog as ordered by the Government!

A. There is no particular figure for that, either.

Q. Well, whatever amount was expended I assume should be included in the estimate, should it not?

A. That is correct.

Q. And I take it, Mr. Mitchell, that you have had no personal experience in connection with the placing of rock for under water piles 135 feet deep, have you?

A. No.

Q. So you had no occasion, I take it, to see what the going price for riprap delivered at the site of work of that kind actually was in 1925, 1926, and so on?

A. We accepted the record in this case.

Q. Well now, why haven't you allowed the actual expendi-

e for the temporary fender system?

A. Because I state in my report there I was only estimatthe cost of reproducing what was existing at the present le. '

2. And did you assume that a bridge of this type would ve been constructed without any temporary fender tem?

A. Yes.

2. Mr. Mitchell, do you think it is proper, when the Comny had to install the temporary fender system at a cost of er \$115,000, do you think it is just and proper to just cut 1.506] that amount out?

A. You said "had to install"?

?. Yes.

A. If that could be shown, there is nothing in my report

t says it should not be included, no.

2. Then suppose we follow that matter up a little bit, . Mitchell. Are you familiar with the permits which m time to time were issued by the War Department in nection with the construction of this bridge?

A. No, I haven't a record of them.

Were you advised that the original permit which s issued on April 18, 1923, contained as condition 4 a dition reading as follows, "That such fenders as may found necessary in the interest of navigation and ored approved by the Chief of Engineers shall be conacted and maintained at each pier, of said bridge by and the expense of its owners"?

A. I had never seen that, no.

2. Your estimate was prepared, then, without knowing re was any such a condition in the War Department mit?

1. That is corrected

Now, let us assume, Mr. Mitchell, for the purpose of next following few questions that you had been in arge of and that you were the president of the American . ll Bridge Company at the time of the construction of s bridge; and suppose that on November 3, 1926, you received an order from the War Department to submit ns for a fender for the bridge, for the protection of rigation; would you have obeyed the order?

A. I certainly would.

Q. Well, following along a little further, suppose that on January 17, 1927, you had then submitted to the War Department a plan for the anchorage of barges for a temporary fender system; and suppose that the Department [fol. 507] had issued detailed instructions contained in a letter of that date, instructing you as to the exact location of the barges, the installation of chains and other detailed protection devices; would you have followed those orders!

A. Yes, I would have to.

Q. Suppose a little later, on May 2, 1927, you received a mandatory letter from the War Department insisting that a temporary fender system be installed at once; I suppose you would have followed those instructions also, would you?

A. Follow most of the instructions that the War Depart-

ment puts out, yes.

Q. Suppose that a little later, on May 14, 1927, you had received another letter from the War Department stating that "A period of approximately one year may elapse before a permanent fender system for the center pier group of the Carquinez bridge will be completed" and that "a more adequate temporary fender system than the existing one should be provided by you without delay," and suggesting the "anchoring of two vessels bow to bow above and two below the group of bridge piers," I am a little bit curious to know what you would have done about it.

A. I am not denying in any way that it was not necessary to do those things in accordance with the War Department orders. I state that my report was based on the premise of reproducing what is there at the present time.

Q. Of course, that estimate is merely theoretical and most distinctly contrary to the actual facts, is it not?

A. I believe not contrary to the actual facts as far as it

goes, I mean the facts I have set up in my premise.

Q. Let us consider a few more facts. Supposing on May [fol. 508] 24, 1927, you had received another letter from the War Department instructing that the following things be done in connection with the temporary fender system:

"a. Increased number of anchors for fender hulls and arrangement of anchors as indicated.

b. Provision of increased fastenings at the bows of the fender hulls, to resist central colliding force.

- c. Installation of 4 small, lighted barges to mark 35-foot depth of water at M. L. L. W., over anchor chains of athwart stream anchors.
- d. Installation of a steel girder strut system between the four piers, both longitudinally and transversely.
- e. Installation of a stub pile and steel-girder-fender system on the channel sides of the two north and two south piers, respectively. Consideration will also be given to the placing of large barges for this protection.
- f. Hulls to be loaded with sand or rock ballast to a degree consistent with size of hulls used.
- g. Guard rails faced with heavy ship channels or steel plates to be placed on channel exposed sides of the four hulls.
- h. Special red Neon lights of ample size and distinctive shape to be installed on hulls at up and down stream points of fender system.
- i. Suitable fog signals with U. S. Lighthouse Department regulations to be installed at up and down stream points of fender system.
- If you had received those further orders in connection with the temporary fender system, Mr. Mitchell, I suppose you [fel. 509] would have obeyed them, would you not?
- . A. Yes.
- Q. It was absolutely necessary, in the face of mandatory orders of that type from the War Department, to obey them?
- A. Absolutely.
- Q. And to incur the expenditures involved in connection with it?
  - A. Yes.
- Q. And would you think it fair years later, after those expenditures had been necessarily incurred, some one should come along and say, 4No, we will just cut out that \$100,000 because we are going to prepare an estimate on an entirely different theory''? Would you think that would be fair?
- Q. I am not questioning whether these expenses were actually incurred in any sense of the word. So far as my estimate was concerned, it was for the purpose of affording

information to the Commission in making up its decision as to a proper rate base. I simply furnished these particular figures that I have shown here and, as I have stated in here, I never have taken up the matter of what had to be done on that temporary fender in any way, shape or form.

Q. I suppose you have noticed, Mr. Mitchell, that the Commission's other experts, in their computations, have assumed the figure which you finally show here of \$6,800,000 without any of the omissions which we are developing in the course of this testimony?

A. Yes, I have noted that.

Q. Well, let us turn to another subject, then. Suppose we consider the subject of overheads. You will find that subject first referred to on page 23 of your report. I suppose you have not had any personal experience, have you, in the construction of a privately owned toll bridge!

A. No, sir.

[fol. 510] Q. Also I imagine you have had no experience in the financing of privately owned public utilities, have you?

A. No, sir.

Q. First, under the head of overheads, as to engineering. I note you have cut the actual expenditure of \$390,076.11 to \$304,320. I think that appears on page 27 of your report.

A. Yes.

Q. I believe you also testified very graciously that the Carquinez Bridge was designed and constructed by engineers of national reputation and that they were good engineers; that is the fact, is it not?

A. Correct.

Q. Do you believe those engineers expended any money

unnecessarily?

A. I think the difference, again, mainly was accounted for by the different assumptions which were made in my estimates of the cost; in other words, that the bridge, under the assumptions I have made, could be constructed in two and a half years, which was considerably shorter, and the proportion of engineering, you will note, is approximately the same, the actual, and in my estimated cost.

Q. Then it is simply a case of pitting your assumptions

against the actualities, is it?

A. That is true.

Q. Are you personally familiar with the work that the engineers had to do in this case?

A. No, I am not.

Q. I suppose that you would not undertake, then, to state that \$390,076 was not a proper amount to be spent for those engineering services?

A. Over the period of time which it actually took to con-

struct the bridge.

Q. Now, let us turn to the fascinating subject of interest during construction. You will find that referred to, I think, first on page 24 of your report. As a matter of fact, in [fol. 511] your original computations in this case you allow only \$313,000 odd for interest during construction, do you not?

A. Yes.

Q. Then you found that that computation was very erroneous, did you not?

A. That is correct.

Q. I imagine that the trouble was that, while you had assumed the entire amount of money was available from the beginning from the sale of bonds, which you assumed to be not earlier than November, 1924, you charged in this original computation interest only on the amounts which are actually expended from time to time, but at the same time credited interest at 3 per cent on the entire unexpended balance; that was the trouble, wasn't it, with that computation?

A. Something similar to that, yes.

. Q. In any event, the computation was wrong to the ex-

tent of about \$797,000, wasn't it !

A. Well, there were two things included there; that is, there was some confusion about allowing the cost of selling stock which, of course, if you are going to assume it was all financed by a bond issue, would not be included.

Q. As a matter of fact, as far as the interest during construction is concerned, you assumed, did you not, that the money would be secured entirely from the sale of bonds,

sold at the very beginning of the project?

A. That is correct.

Q. And this question of commissions on the sale of the book does not enter into interest during construction; it appears under the heading of preliminary expenses, doesn't it?

A. It did; but on the assumptions I am making in this report it would not be a logical item to include. [fol. 512] Q. The question there is whether or not it should be allowed under the head of preliminary expenses.

A. Yes.

Q. It is not a question of interest during construction, is it?

A. No, but I just simply wanted to point out that the two are inter-related and that was one cause for confusion in the original figure.

Q. In any event, you have now increased the amount which you would allow for interest during construction from \$313,563 to \$1,103,634, is that correct?

A. That is correct.

Q. Well, addressing ourselves then to your last item, you have assumed there, have you not, an 8 per cent cost of mone from bonds?

A. Yes

Q. I assume you are aware, Mr. Mitchell, that Mr. Coleman in his report, which is Railroad Commission's Exhibit No. 1, at page 17 reported that the actual cost of bond money alone to the Company was 9.42 per cent, considering discount and expense items, and 8.6 per cent if the capital stock which it was necessary to issue in connection with the sale of the bonds be disregarded?

A. Yes, I was aware of that.

Q. In other words, the lower of these two figures is 8.6 per cent. Then it is a fact, is it not, that the interest rate which you have assumed here is less than the actual cost of the bond money alone to the Company?

A. That is correct.

- Q. How would you justify an estimate here which assumes an interest rate substantially less than that which the Company actually had to pay on the bond money, which in amount was substantially less than what you here assume! [fol. 513] A. I took that rate on the advice of the Commission's engineer, Commission's staff, that that was practically as large an interest rate as they had allowed in any rate case.
- Q. Well, did they advise you that they had had under consideration any case which involved the hazards of this particular project?

A. No, they did not.

Q. Then I take it this 8 per cent is not a figure on which you yourself have passed but simply a figure that you took because it was suggested to you as proper?

A. That is correct.

Q. You do not now desire from the witness stand, Mr. Mitchell, to take the position that that is a proper figure, do you?

A. No.

Q. Mr. Mitchell, is it your judgment that an enterprise of this character, constructed under the circumstances and conditions which governed at the time when it was conceived, a private utility enterprise with all of its hazards, could, as a matter of fact, have been constructed exclusively from the sale of bonds?

A. Probably not.

Q. As a matter of fact, Mr. Mitchell, you have never heard, have you, of an enterprise of this type constructed by a concern which had no assets and had no credit, being inanced exclusively from the sale of bonds?

A. No, that question has not been even considered in my

report here.

Q. In other words, in that respect also your assumption is quite different from the actual facts, is it not?

A. Yes.

- Q. Do you know whether the Railroad Commission would allow a concern of this size to be constructed exclusively from the sale of bonds and without any money having been [fol. 514] put in before from stock sales of from other sources?
- A. Probably not, a company of the character that built the bridge. And my assumptions were made on the premise that there were ample funds available to construct the bridge and to let it to contract immediately.

Q. That is, ample funds would be secured exclusively by

the sale of bonds?

- A. Would be issued by some private company already established.
- Q. Oh, already established? And there again your assumption is contrary to the fact.

A. I agree.

- Q. As a matter of fact, Mr Mitchell, this bridge was built by a concern which was not already established?
  - A. Yes, there is no argument about that.

Q. You didn't suppose, for instance, did you, Mr. Mitchell, that the Pacific Gas and Electric Company would build that toll bridge up there?

A. I don't know of any reason why they should, but a com-

pany so established might.

Q. Then to the extent to which, as a matter of practical common sense and practical actual facts it would be necessary in a case of this kind to secure part of the money from the sale of stock, it was necessary to incur expense?

A. I have not attempted to argue with the fact that the work may have been started on a shoe string and, in fact, I have pointed out one of the differences in the cost as shown by my figures. And that cost was due to the fact that it was started out without sufficient finances and had to work from hand to mouth for a while, and the resulting delays would naturally cause extra expenses.

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Q. The difficulty was that, instead of this being a Utopia, it was the actual construction under actual conditions,

[fol. 515] wasn't it?

A. My report does not deal with what you might say you

would call the actual history at all.

Q. And if in connection with an enterprise of this kind it would have been necessary to secure some of the funds from the sale of stock, of course, an allowance of expenses in connection with such sale would have to be included in preliminary expenses?

A. That is correct; and your interest on borrowed money

would be reduced.

Q. And if it were necessary in an enterprise of this character to raise, say, \$1,000,000 from stock and other sources before you could get anybody to buy the bonds, would you consider that the stock sales expense of \$148,000 would necessarily be unreasonable?

A. I understand that was a 20 per cent discount received by the salesman, which I understand was approved by the

Corporation Commissioner.

Q. Yes, approved by the Commissioner of Corporations of the State of California. Well, suppose we pass on to something else. Just one further point, Mr. Mitchell, as to the preliminary expense item: Apart from the stock sales expense, I understand that you allowed 2½ per cent of the construction costs for preliminary expenses; that is correct, isn't it?

A. Yes.

Q. As I understand it also, you based that allowance priparily on a decision of the Railroad Commission, Decision 6. 8511, 19 C. R. C., page 242?

A. That is correct.

Q. Which was a decision relating to the Golden Gate erry Company !-

A. That is correct.

Q. In your judgment, are the circumstances surrounding ne running of ferries across the San Francisco Bay at all omparable, from the point of view of preliminary expense, fol. 516] to the construction of a toll bridge, under all of its azards, in the Carquinez Straits?

A. No, the conditions would be different.

Q. Would be quite different, would they not? And isn't entirely reasonable to conclude that the preliminary exenses in connection with the project at the Carquinez ridge, would necessarily be considerably heavier than in innection with the running of some ferries across the Bay eref

A. Well, that might be; I am not prepared to state just actly the circumstances in both cases, but that, I take was what the Commission considered, a normal and

ther high allowance for this item.

Q. Just on the general subject of overheads, before we ave that, I understand that you do not question the amount lown on the books of the Company as having been exended for overhead was actually expended?

A. I didn't even go into the subject; Mr. Coleman's reort shows those figures and I have taken them at their ce value, have not questioned whether they were proper not.

Q. For all you know, they were reasonably expended and cessarily expended?

A. As I say, that is all I can say, they are shown on the oks and I have taken them that way.

Mr. Thelen: Mr. Mitchell, I would like to ask you a few estions now about your Exhibit 16, if you will kindly turn that. As I understand it, in that Exhibit 16 you first subt an estimate of cost of reproduction new of the Carquinez ridge.

A. Yes.

Q. And that is a matter to which I first wish to address self rather briefly. Referring first to the subject of ol. 517] quantities, I assume you have used the same quantities in this estimate which you used in your estimate which is in Exhibit 3?

· A. It was my intention, yes, to use the same quantities.

Q. I understand also that any items which might have been omitted in Exhibit 3, such as the temporary fender system, the lighting system and so on, and all other omitted items, would also be omitted in the reproduction cost new study?

A. Yes.

Q. I take it your testimony as to the items which were included in general charges in your Exhibit 3 would also apply to the estimate which appears in Exhibit 16?

A. Yes, it was made up on exactly the same basis as the previous estimate with merely the change in prices from

that time until now.

Q. That is, the change in cost of labor and materials in 1936 and 1937 as contrasted with 1925, 1926, 1927 and so on!

A. Yes, and the conditions around this part of the countrin addition to the cost of labor and material.

Commissioner Riley: Pardon me, wouldn't that also include the difference in the cost of money?

A. Yes, that is correct.

Mr. Thelen: Yes, I am going into that question of the cost of money a little later because it is a matter of considerable importance, Mr. Commissioner. I understand you have here also assumed that 100 per cent of the cost would be secured from the sale of bonds which would have been sold prior to the commencement of work?

.A. That is correct.

Q. And that this money, as I understand it, under the theory which underlies this second estimate, would have [fol. 518] been available on January 1, 1935.

A. Yes.

Q. And only in connection with this second estimate did you assume that the franchise from the Board of Supervisors of Contra Costa County would have been secured?

A. I didn't go into that matter at all; I just, you might say, transferred everything bodily from the first estimate, only moved it off, moved it up a period of years.

Q. Did you make any assumption as to when the first permit from the War Department would have been secured!

A. No.

Q. Did you assume there would be no difficulties or obstacles amounting to anything?

A. Yes.

Q. So we are to be again transported happily into the realm of unrealities?

A. I don't believe so. I believe under the circumstances—I mean under the assumptions I have made in making this estimate, that the arguments are ample and the time ample to construct the bridge.

Q. But you have assumed no difficulties, you have assumed no observes and you have assumed all the money could be secored at the outset from the sale of bonds, is

that right?

A. That doesn't mean no obstacles, but I have made that assumption, that the money could be secured from the sale of bonds.

Q. You did make that assumption?

A. I did make that assumption. That doesn't mean there were no obstacles.

Q. You naturally assumed private financing and not State financing?

A. I did, yes.

Q. Now, if you will please turn to page 1 of your report with reference to the subject of wages, will you please tell me—well, in the first place, it is a well known fact, is it [fol.519] not, that the wages for the type of labor which would be involved in the construction of this buidge are substantially higher now, and have been in 1936 and 1937, than was the fact in the 20's?

. A. Yes:

Q. I would be very much obliged if you would tell me what in general that increase in wages from that time to 1936 and 1937 has been. If you have it in terms of percentages for different types of labor I would be glad to get it.

A. Well, the structural iron workers, for example, the rate per hour in 1924 was about \$1.12 according to the Engineering News Record, at San Francisco, and in 1936 and

1937 it is about from \$1.37 to recently \$1.50.

Q. Have you the corresponding figures as to any of the other types of labor in connection with the construction of the bridge?

A. No, I have not here.

Q. Then might I just ask you this question, Mr. Mitchell, as to whether the increase to which you have testified, referring to wages of structural iron workers, may be regarded as typical of the increase in the wages of the other types of artisans employed on that job?

A. I think they are roughly typical, yes.

Q. How much do the figures which you used include for

Social Security taxes?

A. We haven't put that down as a separate item. We have allowed an increase in the general charges on account of that, but as stated in the report, we have also reduced the charges due to the fact that the equipment is available and the methods of handling the work are more certain now than they were at the time the bridge was built.

Q. Mr. Mitchell, Social Security tax is not figured on [fol. 520] equipment; it is figured on actual wages paid, is

it not?

A. It is a general charge, yes.

Q. You say you have included it in general charges?

A. Yes.

Q. And how much have you included in general charges!

A. Le couldn't give you that figure; I haven't the break down.

Q. Of course, there wasn't any such tax in the 20's, was there?

A. No. That is an additional figure, I will admit; but we have taken those into consideration and I believe our resulting unit prices are high enough to include all this.

Q. It is a fact, is it not, that in 1936 and 1937 the amounts which were required for compensation insurance were in

excess of what they were in the early 20's?

A. Yes.

Q. And that is true also as to the public liability insurance rate?

A. Yes, they have changed.

Q. I understand from page 1 of the report that the cost of materials has also gone up, 1936-1937 as contrasted with the 20's?

A. Yes.

Q. Have you the cost of timber piling in 1924, '25 and '26 as contrasted with 1936-37?

A. No, I don't have that.

Q. Isn't it fair in general to say that, as far as wages and materials are concerned, the costs of wages and of most materials was higher in 1936-37 than it was when the Carquinez Bridge was actually constructed?

A. Yes, I have stated that in the report.

Q. You didn't have prices from any other job comparable to this Carquinez Bridge job, did you?

A. Not exactly comparable, no; but I believe, as far as [fol. 521] the relative costs over a period of years is con-

cerned, that they should be considered comparable.

Q. Well, as I understand it, you were not checking over relative costs over a series of years; what you were doing was that you were making an estimate of the peconstruction of this bridge in 1936-37, just those 2 years?

A. Yes, but I mean as compared with prices received back

in 1924 and 1925.

Q. Now, if you please turn to page 7 I would like to ask you one or two questions concerning items on that page; You estimate there, do you not, as of 1936-1937, an item of \$40,000 in connection with riprap for Piers 2 and 3?

A. Yes.

Q. That is the same figure that you used in connection with your earlier estimate, merely rounding off \$39,000 odd to \$40,000?

A. Yes, that was the intention, to use the same figure.

Q. Hasn't there been a substantial increase in wages in connection with the placing of riprap, 1936-1937 as compared to 1924-25?

A. There should have been.

- Q. Don't you think, as a matter of fact, that that same riprap would cost more placed in 1936 and 1937 than it actually cost in, we will sav, 1924, '25 or 1926, along in there?
- A. Well, of course, it might or might not, according to the availability of equipment and the local conditions, and it is relatively small, the change that would make.

Q. I take it you did not secure any actual bids on that

riprap?

A. No.

Q. On page 8, in connection with rock fill, you used a price of \$1.20, did you not, per ton?

Q. That is the same figure that you used in your earlier [fol. 522] estimate, is it not?

A. Yes, and the story was just the same as on the other riprap.

Q. No allowance in either for increased cost of wages in the meantime?

A. No, assuming that would be probably counterbalanced with better facilities for handling.

Q. Do you know of any riprap which was actually placed in 1936 or 1937 anywhere in the State of California under conditions comparable to those here, at as low a rate as \$1.20 per tou?

A. No, I can't state any at this time.

Q: Isn't is a fact that for placing such riprap in 1936 and 1937, under conditions which obtained at the Carquinez Bridge, the price of \$1.65 per ton would be far more proper than \$1.20?

A. I don't know that, no. I have stated that, of course, some of these prices can only be averages, approximately correct—might be slightly low on some things or slightly

high on others, but I believe the total is ample.

Q. Now, on page 7, if I may turn back just a minute, I find the last item there, exploration of foundations, \$45,000. That is substantially the same figure as you used in your Exhibit 3, is it not?

A. Yes.

Q. And there again there is no allowance for increased cost of labor?

A. No.

Q. Now, a little while ago Commissioner Riley referred to the very interesting and important subject of interest during construction and cost of money, and I would like to go into that in connection with this estimate. As I take it, in connection with interest during construction, Mr. Mitchell, you have assumed again that this project would be financed exclusively from the sale of bonds at the outset?

A. Yes.

[fol. 523] Q. And I understand also you have assumed that the project would be built by some going concern, such as the Southern Pacific Company, for instance?

A. Yes.

Q. And I take it you know of no particular reason why the Southern Pacific Company should have built this bridge in order to help automobiles compete with it, either in 1925 or in 1937?

A. No, I merely submit that as to the type of concern that I pictured.

Q. Now, as I understand it, in this estimate you assumed a cost of money of 5.5 per cent in connection with the sale of the bonds; that is correct, is it not?

A. Yes.

Q. And as I understand it, you assumed \$6,400,000 of bonds would be sold by a new concern, without either property or credit and with only 10 years of franchise to go, and you base your assumption on the fact that they could seeme that money at 5.5 per cent?

A. Yes.

Q. As a matter of fact, Mr. Mitchell, the American Toll Bridge Company, at that time a going concern, had some experience in connection with refunding the bonds in 1935, did it not?

A. Yes.

Q. At that time the Company issued \$4,300,00- of new bonds in connection with calling in the old bonds?

A. Yes.

Q. Do you know what the actual cost of money in connection with that refinancing was?

A. Not unless Mr. Coleman's report shows it. I don't

remember it at this time.

Q. Have you available his report and can you look at page 18? On page 18 of Mr. Coleman's report it appears that the cost of money in connection with that refinancing was 6.18 per cent.

A. Yes.

[fol. 524] Q. That was in connection with a bond issue of only \$4,300,000.

A. That is correct.

Q. Do you think it reasonable to assume that, in connection with a larger bond issue, namely, \$6,400,000, that the Company could have got the money for substantially less than it actually was required to ray in connection with this 1935 refinancing?

A. Yes, if it is assumed that they had the full period of time over which to amortize the project. Of course, that is a question I have not passed on here. I assumed that that would be the case, that you would assume they could start

off fresh and have the 23 years.

Q. In both cases, as of 1936 and 1937, there were only 10 or 11 years of franchise left?

A Yes; and that, of course, would react against the sale

of the bonds at a lower rate of interest.

Q. As a matter of fact, Mr. Mitchell, with a concern which unfortunately has only 10 or 11 years left of franchise life, do you think it possible for that concern, in rebuilding this

bridge in 1936-37, to have gotten bond money for as low

as 5.5 per cent?

A. Not with that short period; but I am assuming here they would have a longer period on this reproduction as of this date. I am assuming the franchise life would continue for 21 years. Whether that is correct or not I am not prepared to argue.

Q. This is an estimate to reconstruct the bridge from

January 1, 1935, to November, 1936, isn't it?

A. Yes.

Q. This particular bridge, with its franchise life only extending 10 or 11 years more?

A. Well, if that was the case, I don't think anybody

would ever build the bridge.

[fol. 525] Q. Now, you have assumed that this money which you would secure from the sale of bonds would be put in savings banks, in so far as it was necessary from time to time for the construction?

A. Yes.

Q. Page 16 of your report?

A. Yes.

Q. You have assumed that you could get 2 per cent on that money?

A. Yes, for 6 months' periods.

Q. This was put into savings account?

A. Yes.

Q. Don't you know, as a matter of fact, that under the rules of the Federal Reserve system the corporation could not have put any money in savings accounts in 1936 and 1937?

A. No, I don't know that. I was advised by the accounts that this was reasonable.

Q. Well, I am going to protect the accounts, because there is a mistake there somewhere. You were not advised that, under the regulations of the Federal Reserve System, there is only one type of corporation which could have made a deposit in savings banks in these years, namely, a corporation engaged in work of a religious, philanthropic, charitable, educational, fraternal or similar organization, and not operated for profit?

A. No, I was not advised.

Q. And if the corporation could not have made a savings bank deposit, which is obvious under the rules and regulations, how would you have gotten this 2 per cent interest!

Q. I don't know any way you could, of course, get it besides short term loans in general, if they are permissible, and I believe for these months which we have assumed it would be possible to collect a certain amount of interest on short term loans. We have not assumed any interest on less than 6 months.

[fol. 526] Q. Are you acquainted with the fact that the only way that situation could have been handled by making deposits in banks would have been to make a short time loan at the rate of interest at that time of approxi-

mately one-half of one per cent?

' A. No, if that is the only way, I didn't know it.

Q. Of course, if that was the fact, the result would have been a substantial change in your allowance for interest during construction?

A. Certainle if that was the fact.

Q. Now, Mr. Mitchell, a while ago you referred to the question of whether anyone with ordinary common sense would reconstruct this bridge under existing conditions; and as I understand it, you have expressed the view that, with only 12 years of franchise left as of January 1, 1936, people of good sense simply would not reconstruct that bridge in 1936-37, isn't that true?

A. That is the way it impresses me, yes.

Q. Then any estimate of cost of reproduction as of 1936-1937 is—well, it is purely hypothetical, isn't it?

A. Yes, the cost of reproduction is hypothetical.

Q. And not in accordance with the facts of life as the relations of people with ordinary horse sense are conducted?

A. I have not attempted to go into what weight should be

given any of these estimates, of course.

Q. In your opinion, Mr. Mitchell, would the estimated cost of reproducing either this bridge or the Antioch Bridge in 1926 or 1927 have any follow at all in this case?

in 1936 or 1937 have any value at all in this case?

A. I would hate to say that. I can just merely state from that angle here, as I stated there, that I don't see [fol. 527] how it would apply. I am not in position to state whether if has any value or not.

Q. The reason why it would not apply would be simply that people with horse sense would not reconstruct either of those bridges in 1936 or 1937 with only 10 years fran-

chise to go.

. A. No, I don't believe they would.

Mr. Thelen: Mr. Mitchell, I have only a relatively few additional questions and they will be directed to your exhibit 17, which is the exhibit that deals with the Antioch Bridge. As I understand it, in Exhibit 17 you have prepared two estimates in connection with the Antioch Bridge, the one being the estimated reasonable original cost and the second being an estimate or reproduction cost new as of 1936-1937?

A. Yes.

Q. Now, have you any reason to doubt that the moneys which are shown on the books of the Company as having been expended in connection with the Antioch Bridge were actually expended?

A. No, I haven't questioned that.

Q. And I suppose you do not question the fact of those moneys having been reasonably and necessarily expended?

A. I just haven't taken it into consideration in this re-

port.

Q. Now, as I take it, the general assumptions with reference to the methods of construction which you followed as to the Antioch Bridge are in general the same as those which you followed in connection with the Carquinez?

A. Yes.

Q. I assume that the cost of material and wages which you used in connection with the Carquinez Bridge, both as to the original construction and as to the later reproduction [fol. 528] tion cost new, are also used by you in connection with the Antioch Bridge?

A. Yes, they have been considered in the same light.

Q. I believe here also you have assumed that all the money for the construction of the bridge would be secured from the sale of bonds exclusively and that that money would all be available from the beginning of the construction?

A. That is right.

- Q. And with reference to your assumed cost for reproduction new, I sume you have again assumed that you could secure the band money at a cost of only 5.5 per cent?

  A. Yes.
- Q. And you have assumed also that you could place such of those moneys as you did not need from time to time on deposit in savings banks for 6 months' periods at 2 per cent interest?

A. Yes, sir.

Q. Now, as to certain overhead expenses, such as engineering expense, general expense and preliminary expense, I assume you have used the same percentages of construction cost as you also used in connection with the Carquinez Bridge?

A. Yes, sir.

Q. Now, by these various assumptions and estimates you assume, do you not, that you could have built the Antioch Bridge for approximately \$400,000 less than it actually cost the American Toll Bridge Company?

A. Yes.

Q. And I assume, Mr. Mitchell, of course, you have never constructed yourself a bridge like the Antioch Bridge, have you?

A. Not like it, but certainly bridges that have the same

features in them that the Antioch Bridge has.

- Q. Now, as to reproducing that bridge new as of 1936 or 1937, with only 11 or 12 years of franchise to go, do you [fol. 529] believe that anyone with reasonable judgment and common sense would have reconstructed that bridge in 1936 or 1937?
- A. No, if you assume that you have to get back the entire cost of the bridge within that period of time—and that is the basis on which your assumption is made—if you assume you have already so much out of it in proportion to its time, why, that would be something different,

Q. Do you know whether the Antioch Bridge has been

operating af a profit or a loss?

A. I think the other exhibits will make that quite plain here. I would not presume to state how much it has earned at this time.

Q. Don't you know, as a matter of fact, Mr. Mitchell, that that bridge has been operating at a loss?

A. I know it has lost—it is, at least, not comparable to

the Carquinez Bridge ir income.

- Q. Now, on page 5 of your Exhibit 17 near the bottom I find this comment, "It is doubtful if revenue bonds based on this structure alone and bearing any reasonable rate of interest could be sold today." Just what do you mean by that statement?
- A. That the potential earnings probably would not be attractive, of course, to anybody at this date in financing such a structure.

Q. That would be true, would it not, also of an authority which issues what we call revenue bonds?

A. Yes, I doubt if it would be done.

Q. Well then, I assume it is your judgment in the present proceeding that the estimated cost of reconstructing the Antioch Bridge in 1936 or 1937 would have no more value than a similar estimate as to the Carquinez Bridge?

A. No more value, no.

[fol. 530] Mr. Thelen: I think that is all.

## Redirect examination:

Mr. Rowell: I have a few questions particularly pertaining to your last table contained in Exhibit No. 16 and particularly with reference to the first column of figures, the book accounts allocated to the construction. You have them before you?

A. Yes.

Q. Will you explain from what source you obtained that first figure of \$5,816,000 under the head of "Total construction cost"?

A. In Mr. Coleman's report, which I believe is Exhibit 1, on page 7 under the heading "Carquinez Bridge cost" he shows items of payments to contractors, fender system and various other items down to, but not including, organization expense, and the figure of \$5,816,556 is the sum of those items.

Q. It is the sum of the first eight items extended in Mr.

Coleman's Exhibit No. 1 on page 7, is that correct?

A. That is correct.

Q. Then the next item, the ninth item, in Mr. Coleman's exhibit, \$476,707.70, also appears in your Exhibit 16 on page 19, does it not, under head of preliminary expense?

A. Yes.

Q. Now, going back to the item of construction engineer-

ing, where is that found?

A. Following organization expense in Mr. Coleman's report he shows engineering, overhead equipment and various other engineering expenses totaling \$390,076.11, which I have used opposite the term "Construction engineering" in my report.

[fol. 531] Q. And the next item of general expenses, Mr. Mitchell, \$492,018.27, does that also appear in Mr. Cole-

man's Exhibit No. 1?

A. Not exactly those figures. However, he shows under general overhead various items which include interest and amortization amounting to \$688,092.56, which I have shown opposite interest during construction in my report. Subtracting this figure from his total for that item of \$1,180,110.83, you arrive at the \$492,018.27 which I have shown as general expenses.

Q. Therefore, as I take it, your total on page 19 representing the book costs under those six different accounts is exactly the same as those shown in Mr. Coleman's Exhibit No. 1 on page 7 where he has itemized them under 20 or

more different accounts?

A. That is correct.

Q. Now, have you or can you compute for us the relation in per cent of the five items contained in column 1 on page 19 of your exhibit to the first construction cost item of \$5,816,556? In other words, treating all of these subsequent items as indirect or overhead charges, what percentage relationship would that be to the physical property?

A. It would be 35.2 per cent of the total construction cost, that is, the sum of those overhead charges would be 35.2 per cent of the first figure shown as total construction cost.

Q. So the Company's books show that, in addition to the cost of the physical structure, there were indirect charges in addition of about 35.2 per cent, isn't that right?

A. That is correct.

Q. Referring now to your second column on page 19, the [fol. 532] check analysis of the first cost, will you give us the relation in per cent of the indirect or overhead items there contained in relation to the construction cost of the physical property?

A. The total of all the overhead items, from which you will note here should be excluded the value of land and equipment, is in this case about 34.6 per cent of the items

shown as total construction cost.

Q. So, excluding land, you have allowed in your analysis of first cost 34.61 per cent for overhead and other indirect charges, have you not?

A. That is correct.

Q. As compared to the book percentage for overheads of 35.2 per cent?

A. Yes, that is correct.

Mr. Rowell: That is all I have. Mr. Thelen: Nothing further. Mr. Thelen: Call Mr. Coleman.

F. COLEMAN, recalled.

## Cross-examination:

Mr. Thelen: Mr. Coleman, you have been with the Commission's Department of Finance and Accounts for quite a long time, haven't you?

A. Yes, sir.

Q. And you have there received your training under Mr. W. C. Fankhauser, haven't you?

A. Yes, sir.

Q. Now, I would like to ask you this question, Mr. Coleman: Suppose that a new enterprise, without assets and without credit, should come to the Railroad Commission for authority to finance, is it the Commission's policy to permit such concern to secure all of its funds from the sale of bonds alone, without part of the funds being secured from [fol. 533] the sale of stock or other sources?

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A. In general the answer to that is no, unless there were turned over to the corporation other properties, such as lands, which would boost the equity back of the bonds up

to a figure in excess of the bonds.

Q. I was assuming a case in which the corporation which came to the Commission had neither assets nor credit. In that case I take it the Commission never permits any such concern to finance itself exclusively from the sale of bonds, does it?

A. I don't know of any cases when it did.

Q. And that goes back over an experience of at least 15 years with the Commission?

A. That is right.

Q. Can you state, Mr. Coleman, as to what the Commission's general requirements in finance cases during the last 15 years have been with reference to the sources from which a corporation may secure its funds for capital expenditures, assuming that this corporation to which we are addressing ourselves is a new corporation which has neither assets nor credit?

A. Well, there have been cases where the Commission at the outset has required a corporation to secure its funds through the issue of stock. As to the ultimate financing, in the eneral it has been the Commission's policy to limit bond sues up to approximately 60 per cent of the construction ost.

Q. And it has been the general policy to require such conern to secure other funds, the remaining 40 per cent, from he sale of stock or some other sources?

A. In general, that is correct.

Q. Isn't it true also in general that the Commission has equired that at least a substantial amount of those other ands be on hand before the utility is permitted to issue its fol. 534] bonds?

A. Yes, sir, that is correct. I might go a little further han that and say that in many cases with a new enterprise be Commission has required proceeds from stock to be impounded and to be released only upon supplemental order the Commission, until sufficient funds were on hand to sure the starting of the project.

Q. Those precautions are taken, are they not, to prevent cople from innocently investing in securities and then finding everything goes to smash because the concern has not.

en properly financed?

A. That is correct.

Q. Now, in your opinion, Mr. Coleman, could the American Toll Bridge Company, a new enterprise without assets or credit, have undertaken the hazardous construction a toll bridge across the Carquinez Straits and have been ble to finance itself, in the years 1923, 1924 and 1925, example of bonds?

A. No, sir, I don't believe it could.

Q. Assuming that I would ask you the same question, Mr. bleman, as to the construction in the years 1936 and 1937, assume your answer would be the same?

A. Well, of course, you also have to take into considerain this Commission's jurisdiction there—whether or not e Commission would permit that if the Company could sellbonds up to 100 per cent.

Q. Yes, I am assuming the case in which the particular lity was clearly subject to the jurisdiction of the Com-

ssion.

A. I would question whether the Commission would authorize the capitalization up to 100 per cent with the issue of bonds.

Q. I imagine your answers would be the same if I had [fol. 535] asked the same question both as to the 20's and as to 1936 and 1937, substituting merely the word "Antioch" for "Carquinez" Bridge!

A. Yes, I would say no difference.

Q. Now, I would like to ask this question, as to whether, in your judgment, this concern, if it were a new company without assets and without credit, seeking to construct the Carquinez Bridge in the years 1936 and 1937, issuing \$6,400,000 of bonds for that purpose, could possibly have secured its money at the low cost of 5.5 per cent?

A. In what year? Q. 1936 and 1937.

A. Probably not privately, unless they could get it from some Government agency.

Q. Yes, if it stood on its own feet as a public utility, it would be impossible, would it not?

A. It would be improbable.

Q. That improbability is shown by its actual history in connection with this refinancing in 1935, is it not?

A. Yes.

Q. Now, if you will kindly look at page 1 of your Exhibit 1, you report there, do you not, that the American Toll Bridge Company was organized to build two toll bridges, one across the Carquinez Straits and the other at Antioch!

A. Yes, sir.

Q. And it is a fact, is it not, that the books of the Company show expenditures in connection with construction and operation of both these bridges?

A. Yes, sir.

Q. There are no separate books kept for the Carquinez Bridge as distinguished from the Antioch Bridge, or vice versa?

A. No, sir, there is one set of books with, however, different ledger accounts for each bridge.

[fol. 536] Q. And as you say on page 2, it is a fact, is it not, that during all the time the construction work was going on on the Antioch Bridge, construction work was also going on on the Carquinez Bridge?

A. Well, the construction work on the Carquinez Bridge started prior to the time construction work did on the Antioch, but the Antioch was completed before the Carquinez Bridge.

Q. During all the time they were building the Antioch Bridge they were also working on the Carquinez Bridge?

A. That is right.

Q. On pages 5 and 6 of your exhibit you show, do you not, the assets and liabilities of the American Toll Bridge Company as of August 31, 1937, as found by you on the books?

A. That is the balance sheet that I derived from a trial

balance of the Company accounts.

Q. You show a total of assets of some \$13,390,000, do you not?

A. Yes, sir.

Q. Without going into the details, Mr. Coleman, it is a fact, is it not, that many of the items of liabilities and also certain of the items of assets are applicable to both the Antioch and the Carquinez Bridges?

A. That is right.

Q. Take, for instance, the very first item under liabilities, that of capital stock, that is the capital stock of the entire corporation, isn't it?

A. Yes, sir.

Q. And then the next item of bonds, they are bonds issued by the corporation as against both bridges, are they not?

A. Yes, sir.

Q. And without going through the details, it is a fact, is it not, that if you are going to try to find what assets or what [fol. 537] liabilities are applicable to one or the other of these bridges it is necessary in many cases to make what you call segregations on certain bases?

A. Or apportionments.

Q. Yes, apportionments, I should have said.

A. This is the balance sheet of the entire corporation.

Q. Now, on page 7 you show the investment in the Carquinez Bridge, do you not, as you found it on the books?

A. Yes, sir, being a detail of the columns—

Q. The total figure being \$7,863,451.17?

A. Yes, sir. In that total I have added the \$300 item that I explain in the second paragraph on the page.

Q. Have you any doubt that that money was actually ex-

pended by the Company?

A. These are the recorded charges according to the Company's books.

Q. Have you any reason to believe that there was any inaccuracy in connection with the recording of those charge, or that expenditures were shown which weren't actually incurred?

A. I have no reason to believe that, no, sir.

Q. Now, on page 16 I find, Mr. Coleman, that you have set forth near the top of the page, in connection with stock financing, an item of \$800,000 representing stock issued to the purchasers of the bonds?

A. Yes, sir, that stock was issued to the underwriters of

the bonds, who were the purchasers, of course.

Q. As I understand it, it was 500,000 shares shown on the books at \$1.60, making a total of \$800,000?

A. That is correct.

[fol. 538] Q. I imagine that while you were examining the Company's records you found the contract, did you not, which provided for the issue of that stock?

A. Yes, sir.

Q. And you haven't any doubt, Mr. Coleman, have you that the stock was actually issued?

A. No, I have no doubt.

Q. And I suppose you are expressing no opinion as to whether it was necessarily issued or not?

A. Well, there seemed to be a necessity, as I gathered; the underwriters wouldn't take the bonds unless they were also

given that stock.

Q. Will you please turn to page 22 of your report, Mr. Coleman. You show there, among other matters, the moneys which have been paid out during the life of the corporation in the shape of dividends, do you not?

A. Yes, sir.

Q. You show, do you not, certain relatively small payments in 1924 and 1925 and then nothing further until 1936!

A. Yes, sir, that is what the record shows.

Q. So that the books show that during the years 1926 to 1935, inclusive, being 10 years, the Company paid no dividends whatever?

A. That is correct.

Q. Then in 1936 they paid a dividend of 8 cents a share. I take it?

A. 8 per cent—8 cents a share.

Q. That is, 8 per cent on the par, of course. And then in 1937 they paid 13 cents, did they not?

A. This figure on page 22 is up to August 31st only. Since that time an additional dividend has been paid.

Q. Making a total of 13 cents?

A. I understand 13 cents has been paid this year.

Q. On page 23 you show, do you not, the income account from January 1, 1926, to August 31, 1937. That is for the Company as a whole, is it not?

[fol. 539] A. Yes, sir. You will observe it breaks down the

revenue and expense to the two bridges.

Q. And, of course, as far as revenues are concerned, it is very easy to report those actual facts for each bridge, is it not?

A. Yes.

Q. And as to expenses, I imagine that is true as to certain expenses but would not be true as to overheads and kindred expenses?

A. That is correct, some of the expenses are apportioned

between the two bridges.

Q. As to the Antioch Bridge, Mr. Coleman, I would be obliged if you would look at the item which reads "Net operating revenue". It is true, is it not, that during the years 1926, 1927, 1928, 1933, 1934, 1935 and 1937 to August 31st, that bridge operated in the red?

A. Yes, sir. Depreciation, however, is included in the op-

erating expenses before arriving at this net loss.

Q. Well, I assume it is necessary to include items for depreciation, is it not?

A. Oh, yes; but the only point is that that was not neces-

sarily a cash expenditure.

Q. You have made a very careful analysis of the cost of money, Mr. Coleman, and I would like to ask you a few questions on that subject beginning with page 17. As I understand it, on page 17 you refer to the original bond issues as distinguished from the refinancing in 1935?

A. Yes, sir.

Q. Now, am I correct in assuming that you have ascertained that, as far as the original bond issues were concerned, the cost of the bond money on the straight line basis was 9.42 per cent?

A. That is the figure I obtained, if my arithmetic is

correct.

[fol. 546] Q. I certainly would not challenge your arithmetic, Mr. Coleman, so we will assume that is correct. And

if we include also certain items totaling \$116,639 which might properly be considered as bond expense, the cost of money would be raised a little, to 9.71 per cent on the straight line basis?

A. Yes, sir. That includes, of course, the amortization of

the bonus stock.

Q. Do you happen to have any figure showing what those percentages would be on the sinking fund basis, Mr. Coleman? If you haven't them now I would not ask for them now.

A. Well, in the next paragraph I give that cost computed on the 6 per cent sinking fund basis and excluding bonus stock.

Q. That figure is 8.6 per cent?

A. Yes:

Q. Have you a similar percentage including the stock which was issued in connection with it?

A. I haven't that now. I can easily compute it.

Q. Would it be too much trouble to ask you to prepare it and some time later give it to us?

A. I will tell you right now—would be just slightly in ex-

cess of 8.6, somewhat in excess of 8.6.

Q. Now, I would like to read a question to you, Mr. Coleman, which was asked of you by Mr. Rowell, and then I would like to ask that you,—want to follow it up a little bit further. I am reading from page 117 of the transcript, where Mr. Rowell asks you this question,

"Mr. Coleman, if you were to treat the investment made by the holders of bonds and the holders of stock of the American Toll Bridge Company as a wasting asset, to be returned over the remaining franchise life, would the decreased net revenue as estimated by Mr. Hunter be suff-[fol. 541] cient to so amortize the investment of the bondholders and stockholders plus, after the payment of all expenses of operation, over that period?"

You remember that question, do you not?

A. Yes, I remember that question.

Q. You also remember that you submitted certain computations, in response to that question, and those computations ultimately found their way into Exhibit 22, did they not?

A. Yes, sir.

Q. Now, when Mr. Rowell asked you that question, referring to a wasting asset, please state whether you understood that term, as applied to the facts in this case, to mean that the investment from the beginning is to be treated as a wasting asset and is to be returned with fair interest or dividends by the time the franchise expires?

A. I think that is correct. I have considered that here was an asset whose value would cause on a certain known

date.

Q. And by that date, of course, it would be necessary to have the investment returned.

A. That is right.

Q. And in the meantime, those who made the investment would naturally expect to receive reasonable interest, if it were bonds, and reasonable dividends if it were stock?

A. I presume that would be the reason they would make

the investment.

Commissioner Riley: Let me understand that. The question is more far-reaching than I think is appreciated. What you mean to say is that the investor of money should have had his reasonable dividends from the beginning until now?

Mr. Thelen: Why, certainly.

Commissioner Riley: And from now on?

Mr. Thelen: Why, certainly.

[fol. 542] Commissioner Riley: Is that your conception, Mr. Coleman?

A. No sir; I was looking at the question from now on.

Commissioner Riley: That is what I thought.

Mr. Thelen: That computation looks at it from that point of view, but his theory of a wasting asset begins at the beginning.

A. That would be correct if we were studying this picture

from the very beginning.

Q. It would not be proper just to jump in at the middle and say, "Regardless of all the sacrifices that were made in the past, we won't pay them back to you but will simply take care of the future"; that would not be a fair proposition, would it, in the case of a wasting asset?

·A. In this particular wasting asset, or in general?

Q. Any one.

A. Of course, in this particular one we had no voice in the matter until now, and that was the reason we were considering it from now on. Q. And now, having a voice in the matter, I assume that true to the traditions of the Commission in the past, you would want to exercise your present authority in a way that was fair and just?

A. Certainly.

Q. Now, turning to the other source of capital, namely, that which came from the issue of stock, I understand that looking from now ahead for the remaining 10 years you provide that the stock is to be amortized; that is correct?

A. Yes.

Q. And that certain dividends are to be paid from now on?

A. That is right ..

Q. But making no provision to reimburse the stockholders for the sacrifices which they suffered in the past throughout the 10 years when we know that no dividends at [fol. 543] all were paid, when they got no dividends at all!

A. No provision is made for those past losses here.

Q. Have you made any computation to determine what the deficiency in dividends was throughout the past years on the assumption of an 8 per cent dividend?

A. No, sir, I haven't those figures.

Q. Would you be surprised if it amounted to as much as \$2,250,000?

A. No, I think that would be about correct.

Q. In other words, that is money which the stockholders failed to get because they were not paid an 8 per cent return?

A. That is the 10 years' dividends, yes.

Q. And, of course, if one takes the theory of a wasting asset and applies it logically from the beginning, instead of jumping into the middle of the period, those stockholders would have been taken care of as far as dividends are concerned?

A. That would be correct if you started from the beginning.

Q. This case is quite different, is it not, from the normal case of a public utility which has a franchise lasting a great many years or which is indeterminate in character?

A. Yes, sir, so far as I know, it is the first one of this kind

Q. First one the Commission has ever had, isn't it?

A. So far as I know.

Q. In the case of the usual public utility which has an indeterminate franchise, or at least a long term franchise, if

the dividends can not be paid during the early years there is at least the hope that they can be made up later?

A. That is right.

[fol. 544] Q. Now, I have just a few more questions about this Exhibit No. 22. I would like to have you address yourself, if you will, to the item of stock outstanding, \$3,719,593.

A. Yes, sir.

Q. Now, as I understand it, you valued that stock at \$1 per share?

A. Yes, sir.

Q. And I believe you testified that you had reason to believe at least a substantial portion of the outstanding stockoriginally sold for \$2 per share?

A. Yes, sir.

Q. Netting the Company \$1.60 per share?

A. That is correct.

Q. It is a fact, is it not, Mr. Coleman, that as far as the stock that was sold in California to people here is concerned, that was all sold at \$2 per share?

A. So far as I know, that is correct.

## J. G. HUNTER, recalled.

Cross-examination:

Mr. Thelen: Now, Mr. Hunter, if you will kindly turn to page 5 of your Exhibit No. 19. Your figures there shown for return on investment are based, are they not, on an assumed investment of \$6,880,000?

A. That is correct.

Q. Now, that is the figure shown on Mr. Mitchell's report before cross-examination started, is it not?

A. That is correct.

Q. I take it, Mr. Hunter, that you have not yourself made an independent estimate of the reasonable original cost of constructing the Carquinez Bridge?

A. No, that was left to Mr. Mitchell.

[fol. 545] Q. And if it should develop that, as a matter of fact, the figure of \$6,880,000 is too low, that there have been omitted items and other matters which should be considered and which would raise that figure, then I take it, naturally, to that extent necessary revisions would have to be made in your exhibit?

A. That would naturally follow.

Q. In other words, that figure of \$6,580,000 is the key figure, isn't it?

A. That is the figure upon which interest return is com-

puted.

Q. Also is it the figure on which an allowance for depreciation is computed?

A. That is correct.

Q. So that, frankly, that is a very, very important figure in the whole set-up, isn't it? I have referred to it as the

key figure.

A. Well, I would say that it is that figure upon which interest is computed. It is not as important a figure in point of effectiveness as, say—is not as effective as if it were an operating cost.

Q. But there is no dispute as to operating cost; you

have taken the Company's operating sost?

A. That is correct.

Q. But on this item there is a very serious dispute as to whether or not that figure is correct?

A. Well, I have heard the cross-examination.

Q. Well, to the extent to which items have been omitted, of course, it would be necessary to increase that figure!

A. Whatever it should be is the proper figure to use in that table.

Q. Well now, passing to another matter, then, Mr. Hunter, I notice on this same table near the bottom, in connection with the subject of return on investment, under Arabic 2, this statement, "Amount in excess of 6 per cent [fol. 546] return on investment". Now, you are familiar, are you not, with the actual cost of bond money as shown in Mr. Coleman's Exhibit 1?

A. Well, just generally.

Q. I take it you remember Mr. Coleman on his page 17 showed that the cost of bond money, computed on the sinking fund basis and disregarding the stock issued to the purchasers of the bonds, was 8.6 per cent? You heard that testimony, didn't you?

A. Yes.

Q. And you remember on the straight line basis that cost would be 9.71 per cent?

A. Yes, I-

Q. That would include additional items of \$116,639 of cost to which Mr. Coleman testified just a little while ago. Now, with the actual cost of money at those figures, I take

it you don't mean to advise the Commission that in this

case a 6 per cent return would be adequate, do you?

A. Well, of course, in the final analysis, that is a matter for the Commission to determine. The purpose of setting it up is to give the Commission the picture on these two bases, one 6 and one 8. Now, in the ordinary utility it would seem that the Commission should seriously consider the 6 per cent return.

Q. As a matter of fact, isn't it the policy of the Commission to ascertain the cost of money and then to allow something in excess of that? Hasn't that been the policy

throughout all the years?

A. I rather think so.

Q. Then in this case, Mr. Hunter, don't you think when it comes to the fixing of the actual rate, that it would be proper for the Commission to ascertain the cost of money and then make some additional allowance over that? [fol. 547] A. Well, I should say the Commission should follow its precedent as much as it can if they have a case that is anywhere comparable.

Q. Then, as I take it, Mr. Hunter, these figures here, both as to the 6 per cent and as to the 8 per cent, are, as I believe you testified, mere calculations without an expression of opinion on your own part as to what a fair rate of re-

turn would be?

A. That is right.

Q. If you will now please turn to the table which is page 8 of your exhibit, the first item, Mr. Hunter, operating revenue. That in the year 1930 is reported by you as \$1,199,261, is that correct?

A. That is correct.

Q. Then throughout what we may call the depression years, at least up until recent difficulties, we have a substantial falling off of that operating revenue?

A. Yes, with the low in 1933.

Q. Fell down to \$1,157,892 in 1931, then fell further to \$981,813 in 1932 and still further to \$923,020 in 1933, and then gradually climbed up, being \$965,131 in 1934, and \$1,067,075 in 1935 and it was not until 1936, was it, that the Company got the revenue which it got in 1930?

A. That is right; that is the low period on the revenues.

Q. Now, that situation shows very clearly, does it mot, Mr. Hunter, that the revenues of this bridge are largely

dependent upon general economic and financial conditions!

A. Yes, that follows.

Q. Now, on page 10 and also on the following pages of your report you give consideration, do you not, to the effect of the application to the Carquinez Bridge of the same tolks for automobiles and passengers which now obtain on the [fol. 548] San Francisco-Oakland Bay Bridge and the Golden Gate Bridge?

A. That is correct.

Q. Now, Mr. Hunter, as a matter of fact, from the point of view of proper tolls, there are important differences are there not, between the San Francisco-Oakland Bay Bridge and the Golden Gate Bridge, on the one hand, and the Carquinez Bridge on the other?

A. Important differences?

Q. Yes.

A. Well, of course, physically they are quite different.

Q. Take, first, the matter of the franchise life. The Carquinez Bridge has a franchise life of only 10 years and therefore, the investment must be amortized in those 10 years. Now, that is not true, is it, of either the San Francisco-Oakland Bay Bridge or the Golden Gate Bridge!

A. No, that is not true.

Q. That is a very, very important consideration, is it not, as far as the fixing of rates is concerned?

A. Yes; the question of amortizing that investment within the life of the franchise is a very substantial item in the

operating costs.

Q. Isn't it true also that the Carquinez Bridge, by reason of that fact, that is, that it has only a 10-year life, is at a very serious disadvantage in any comparison that may be made with the San Fracisco-Oakland Bay Bridge and the Golden Gate Bridge?

A. Well, it would seem to me if the investors are fairly treated under this plan it irons out any differences that

may exist between the two bridges.

Q. But it is more difficult to treat the investors fairly where there is only a 10-year life left and the capital has to be amortized in that period; that means a very much [fol. 549] higher amortization rate, does it not?

A. That is correct.

Q. Now, another factor, if I may suggest, it is a fact, is it not, that as to the cost of money the situation on the San

Francisco-Oakland Bay bridge and the Golden Gate Bridge is quite different from that of the Carquinez Bridge?

A. I am not a financial expert, but my guess is that the

answer is yes.

Q. As a matter of fact, the funds secured from the Reconstruction Finance Corporation in connection with the construction of the San Francisco-Oakland Bay Bridge were secured at very much lesser rates of interest than the cost of money to the American Toll Bridge Company?

A. That is true.

Q. It is also true as to the bonds sold for the construction of the Golden Gate Bridge?

A. Yes.

Q. That matter of the cost of money, therefore, puts the Carquinez Bridge at a substantial disadvantage in comparison with the other two?

A: Yes, from that side of it.

Q. Isn't it true also that, from the point of view of density of traffic, the Carquinez Bridge is at a disadvantage in comparison with the other two?

A. Somewhat. However, I think when we relate it on a percentage basis the great differences, you might say, disappear. If you are talking of total volume, then there are materially different conditions in the two cases.

Q. Isn't it true also in the very important item of taxes that the Carquinez Bridge is at a distinct disadvantage in

any comparison with the other two bridges?

A. Oh, yes, the taxes are entirely different.

Q. Don't you think, frankly, that by reason of these very [fol. 550] important differences that the Commission, in undertaking to fix the rates for the Carquinez Bridge, ought to be a little slow before they take the rate that is applicable to the other two bridges as being necessarily the proper rate

to apply to the Carquinez Bridge?

A. Well, it was not my thought that, because of the fact they had a 50-cent fare for automobile and 5 passengers on both the San Francisco-Oakland Bay Bridge and the Carquinez Bridge was a reason, or the controlling reason, why they should have a 50-cent fare on the Carquinez Bridge. But in looking over the comparative rate structures of the two bridges, or the three bridges in this case, it just seemed like the fare charged automobiles and passengers on the Carquinez Bridge was more or less out of line with the other comparable fare structures of the other bridges.

Q. Of course, it was different, was it not? It was higher!

A. Much higher.

Q. But don't you believe in fixing the rates for the Carquinez Bridge that consideration should be given to the facts as they actually apply to that bridge instead of perhaps being led astray by making comparison with some other bridge as to which the circumstances are entirely different?

A. Oh, yes, I think the Carquinez Bridge should stand on its own feet regardless of what happens to the other two

bridges.

Q. Well now, Mr. Hunter, I have just a few more questions. Will you kindly turn to your Exhibit 19, page 12, I find on that page 12, Mr. Hunter, a figure of \$809,663 available for return under the existing rate structure. It says, [fol. 551] "Available for return under existing rate structure, \$809,663".

A. Yes.

Q. In order to get that figure you have figured your amortization on that same figure of \$6,880,000 to which we

have already referred, haven't you?

A. Now, I want to correct the exhibit along that particular line before answering that question and then I will answer the question. In the case of depreciation, on page 5 we show the depreciation computed on a 6 per cent sinking fund, and on that same page we show that the amount considered was \$6,880,000. Now, inadvertently there was an error made in this particular item in this way: Our original figure for investment, as developed from the books and the amount allowed for land as shown in the books, was \$8,017, 158. It is upon that rate base or that figure that we computed a sinking fund on a 6 per cent basis, and that results in \$200,465; whereas, we should have used the annuity shown on page 26 amounting to \$171,956 if we were going to be consistent and follow what this exhibit shows. After discovering that situation we computed that to see what sinking fund allowance that would amount to based upon \$6,880,000, and it results in 4.6 per cent. Therefore, it we employ that amount the exhibit should be corrected to read "Depreciation (4.6 per cent)" instead of 6 per cent. Now, I wanted to give that explanation before proceeding to the question you last asked.

Q. And your depreciation figure has been based, however, on an investment of \$6,880,000, has it not, your revised

figure?

A. If we employ the \$6,880,000 investment, then the rate for sinking fund that applies in this case is 4.6.

[fol. 552] Q. Yes. Now, if, as a matter of fact, your investment is \$1,000,000 too low and if, as a matter of fact, the figure should be approximately \$7,800,000, then naturally the application of the 4.6 per cent sinking fund rate would give a total amount larger than what you have just testified to, would it not?

A. That is correct; to the extent that that amount is in-

creased it increases the sinking fund annuity.

Q. And your return, as I think you have already testified to, is also based on \$6,880,000?

A. That is correct.

Q. Referring again to page 12, you show there, do you not, that disregarding any stimulation in the volume of business you show there a reduction of 39.1 per cent in the revenues from automobiles and auto passengers? In other words, that would be the effect of the application of this 50-cent rate to the business as there shown?

A. If it amounts to that percentage. Over in the last column is the amount estimated, decrease, under this other

rate structure.

- Q. In other words, this tabulation proposes a cut of substantially 40 per cent in the Company's automobile and passenger fares?
  - A. It is a little less than 40.
  - Q. 39.1 per cent, isn't it?

A. Very well.

Q. But we are here confronted with a practical situation in which, after 10 years, we are through?

A. That is so.

Q. And I suppose the depreciation annuity will have to be considered on the assumption that in 10 years we are out?

A. That is the way it stands today.

Mr. Thelen: That is all, thank you very much, Mr. Hunter.

Mr. Rohde (San Francisco Chamber of Commerce): Mr. Junter, you have stated that on the basis of estimated earnfol. 553] ings a toll of 50 cents for a passenger ear and 5 assengers would be advisable and return 8 per cent, have ou not?

A. Yes, slightly over 8 per cent.

Q. Have you made any study of the possibilities of reducing the toll on freight carrying vehicles and on the freight self? A. No. However, I think that is an item that should be explored. I was hopeful some of the truck operators would make some studies along that line. We made this study because we thought it was the outstanding situation that should be adjusted, but it may well be that the freight situation should be studied and perhaps adjusted. However, we have not made other than this automobile study.

CHARLES DERLETH, JR., a witness called on behalf of American Toll Bridge Company, being first duly sworn, testified as follows:

## Direct examination:

Mr. Thelen: Dean Derleth, will you kindly state your present position in connection with the University of California?

A. Well, I am the Professor of Civil Engineering of the University of California and also I am the Dean of the College of Engineering in the University of California at Berkeley.

Q. Will you please tell us something of your training and experience, and please don't be over-modest about it. The Commission will be interested in the facts and the positions which you have held in a professional capacity, and

so on. Just state it in your own way, please.

A. Well, as to education, I am a graduate of the College of the City of New York and received a degree of bachelor of science in 1894. I then went to Columbia University, in [fol. 554] New York City, as a student in the school of mines and engineering. In 1896 I received the degree of civil engineer, commonly called C. E. Then a good many years later the University of California did me the honor in 1930 of awarding me the degree of bachelor of laws, L. L. D.

Q. Doctor of laws?

A. I mean doctor of laws. Since 1896 I have been uninterruptedly connected with schools of engineering, but at the same time I have also uninterruptedly been a practicing engineer. Speaking of the teaching profession, from 1896 to 1899 I was instructor in civil engineering in Columbia University, and for the next few years, 1899-1901, I had the

title of Lecturer in the Department of Civil Engineering

at Columbia University.

I came west in January, 1902. I was Professor of Civil Engineering at the State University of Colorado from 1902 to 1903. I was then invited by President Wheeler to join the faculty of the University of California. I came here in August, 1903, and I have been here ever since. I started with the title of Professor of Structural Engineering which later, in 1907, 4 years later, was changed to Professor of Civil Engineering, and head of the department. And at the same time I was selected by the Regents of the University as the Dean of the College of Engineering. I held those two offices until 1930, at which time there was a coalition of the College of Civil Engineering and the College of Mechanical and Electrical Engineering, and I retained and still hold the position of Professor of Civil Engineering and the head ship of the Department of Civil Engineering. but since 1930 I have been the Dean of the joint colleges, civil, electrical and mechanical engineering, and those positions I hold today.

[fol. 555] Q. Will you be so good now, Dean, to tell us something of your professional work outside the University

walls?

A. As I have already stated, I started as a practicing engineer in 1896 in New York City. I became, fortunately for me, the chief assistant to William H. Burr, who was head of the engineering school at Columbia and at the same time a consulting engineer of international reputation. That gave me a very promising start. And during this period in New York from 1896 to 1901 I had the good fortune as a young man to be directly connected with heavy construction, foundations and buildings and bridges. example, as Mr. Burr's assistant, I designed in 1897 to 1899 and was instrumental in the construction of the City Island Bridge, which is in the upper reaches of the East River where it joins Long Island Sound. That bridge in those days cost nearly a half million dollars. You can judge for yourself what it would cost today. It had six or sevenpiers in deep tidal waters, all of them constructed by cofferdam process; it had a draw span and a number of approach spans, was a highway bridge which carried also the street railway. It is in the neighborhood now of what

is known as City Island, bordering the Bronx and Bronx Park.

I also at that time was connected with Mr. Burr in the Kings Bridge which crosses Harlem at its northernmost part where it joins the Hudson at the head of Manhattan Island. That was also a draw span, a much heavier bridge and cost a good deal more money. We designed a good many of the structures. For example, one of the first designs was during McKinley's administration for the Memorial Bridge across the Potomac, for which Mr. Burr re[fol. 556] ceived first prize; also bridges at Niagara Falls and Zanesville, Ohio. Personally, I was the engineer—I think that was in 1899—for the sewer system for the City of Sandyville near Lake George. I think that indicates the type of my experience while in New York at the time I left to go west in January, 1902, to the State of Colorado.

While at the University of Colorado for three semisters, January, 1902, to August 1903, I became what would probably be the consulting engineer and the superintendent of grounds for the University, and I was the engineer in partnership with an architect at Pueblo and we built the library building, the engineering building, and I built a dam or lake on the campus and installed at the campus the first central heating system for the various buildings, with a central heating plant, in the engineering group. I also had a consulting practice in Denver, particularly on dams.

Since I came to California in August, 1903, I have been uninterruptedly connected with, fortunately for me, very

heavy work.

Q. We would be very much interested if you would give us a list of the various projects in which you have been con-

nected in California, Dean?

A. Well, from 1903 on, for more than two decades I was the consulting engineer on all the buildings at the University of California, associated with John Galen Howard, who was the consulting architect, supervising architect. I may say I think, frankly, I was the responsible engineer for the design of such buildings as California Hall, the Library, Agricultural Building, that were built in those years, one [fol. 557] of the first one known as Agricultural Hall, about 1910; built the LeConte Hall for psychics, Gilman Hall for chemistry; I was the responsible engineer for the Doe Library at the University, for the Stephens Union, and

on the Sather Tower, that is, the Campanile. I not only designed but supervised the construction of that tower and a number of others. I think that indicates the type of work I did for the University and for the architect, Mr. Howard.

In these earlier years from 1903 to, say, 1918, I was consulted as a consulting engineer on buildings throughout the Pacific Coast region, Los Angeles to Portland. I remember in 1914, with a local architect, Mr. Hobart, I worked for the Federal Government, and I presume it would be called the Treasury Department, in building the great Post Office at Portland, Oregon, with very deep foundations close to the Willamette shore. There were any number of buildings here in San Francisco, some in Stockton, many in Berkeley and Oakland, such as the Oakland Auditorium. I was the consulting engineer for that. But when it comes to building work, one of my most significant employments was from about 1910 to 1918 by the City of San Francisco. I was in that period the consulting engineer to the Bureau of Architecture in San Francisco and reported to the Board of Works. I was the consulting engineer, working with the Architectural Commission that had been appointed at that time, consisting of John Galen Howard, Frederick Myer and John Reed. It was our purpose to build up San Francisco at that time. I was consulting engineer on practically innumerable buildings, including the great hospitals and many schools like the Girls High School and the Polytechnic High School. The [fol. 558] reason I speak of that employment principally is that I was the consulting engineer to San Francisco's Civic Center in those years and myself designed the Auditorium Building and supervised its construction, and I was responsible as a consultant of the City for the other portions of the Civic Center.

About 1910 I became interested in bridges in this community, just as I had been in New York City a decade earlier. And in 1922 I became the chief engineer of the Carquinez Highway Bridge and held that position throughout its construction and later for a number of years acted as consulting engineer to the American Toll Bridge Company until about 1933. For more than 25 years I have uninterruptedly been the consulting engineer to Alameda County, reporting and consulting with the County Engineer. We have built innumerable highway bridges, con-

frankly say I was responsible, and the largest of those bridges actually built is the Park Street Bridge recently completed across the estuary at a cost of approximately \$1,000,000. It is a Bastule bridge of the latest type and has two very difficult cofferdam foundations as a support to the two Bastule arms. It is a very large Bastule bridge.

I have been consulted on the design and construction of bridges in many of the counties of this State. In 1929 I was appointed a consulting engineer on the Board of Consulting Engineers for the Golden Gate Bridge, which position I held throughout the designing and the construction, and I closed that employment with the Golden Gate Bridge [fol. 559] last June just after the bridge was open to traffic in the last week of May, 1937.

In 1930, I think it was, I became a member of the Board of Consulting Engineers for the San Francisco-Oakland Bay Bridge, of which Mr. Charles Purcell is the chief engineer, and I held that onice throughout the design and construction of the bridge until January, 1937, two months

after the bridge was open to traffic, I think it was.

I might say, too, in closing, that I have been interested in the bridging of San Francisco Bay since 1910. I remember Mr. Charles Evan Fowler, the well known bridge engineer, planned a cantilever bridge from Goat Island to Telegraph Hill. He wanted me to be one of his engineers, which I declined. But between that period and 1930 I have been connected with private parties on more than one occasion seeking franchises for transbay bridges.

Mr. Thelen: Mr. Derleth, there are one or two additional matters in connection with your experience to which I think it might be desirable to refer. I would appreciate it if you would advise the Commission in a little more detail of the experience which you have had in your professional work.

in connection with dams, ocean piers and tunnels.

Q. Well, I omitted that yesterday. Of course, I became so bridge-minded listening to the testimony all day that I overlooked it: I will be brief.

On dams I recall that in March, 1918, the Calaveras Dam failed, which had been built, you will remember, by the hydraulic process. The Spring Valley Water Company retained me in May, 1918, as one of its consulting engineers [fol. 559½] to examine the structure and recommend its re-

construction. I worked with the late Allan Hazen, a man of national reputation, particularly on water filtration and water works structures, and with the chief engineer of the Spring Valley Water Company, Mr. George A. Elliott. We pursued that investigation and the reconstruction of the dam for the next two or three years. At the same time I built or prepared the plans for the Spring Valley Water Company for a large intake tower in Calaveras Lake back of the dam, with a tunnel through the westerly hill abutments to drain the lake in case of an emergency.

Throughout the last 25 years I have frequently acted as consulting engineer on other dams, particularly on multiple arch dams. I will name one or two—the Hodges Dam near San Diego and the Little Rock Dam near Palmdale in the Mojave Desert.

On ocean piers, in 1912 the Regents of the University of California asked me to prepare plans and construct an ocean pier at La Jolla for the Marine Biological Station, and that ocean pier, Ocean exposure, is there today in good condition. In the late 20's I was employed for four or more years by the Pacific Western Oil Company, which had a petroleum field at Elwood, out in the ocean at Elwood, about 20 miles north of Santa Barbara, and I made the plans and supervised the construction of a number of ocean piers that run far out into the ocean.

I also have been consulted on many docks. And finally as for the tunnels, I was the principal consulting engineer to Alameda County throughout the inception, planning and final construction of what is now called the Posey Tube, [fol. 560] which is a sub-aqueous tunnel under the estuary between the Cities of Oakland and Alameda, and replaced the old Webster Street bridge.

Finally, I have been throughout the period of its promotion and planning and construction the chief consulting engineer for the Broadway low leval tunnel which was opened to traffic on December 5, 1937. That is also about a \$5,000,000 project.

Q. Mr. Derleth, I believe you testified that you were the engineer of the American Toll Bridge Company in anection with the Carquinez Bridge project and you were appointed, I believe you said, in September, 1922?

A. September 22, 1922, I was appointed officially.

Q. How long did you have an official connection with that Company in connection with that project?

A. Until 1933.

Q. Will you please state the extent of your contacts with the work on the Carquinez Bridge while that bridge was under construction and prior thereto, just in a general way, and then we will follow up with more detailed questions!

A. That is a long story and if I become too detailed I

trust I may be stopped.

Q. Well, Mr. Derleth, were you on the ground at various

times in connection with that construction?

A. I lived on the construction and throughout all of these preliminaries, and in courts and in New York and Washington, as I will explain if it is desired.

Q. Then I take it you are personally familiar with what

was done, when it was done and why it was done?

A. I was at all times an eye witness and the deciding agent for the construction.

[fol. 561] Q. Will you please just start with the earlier days of the project and in your own way advise the Commission as to what took place and when it was done. I may interrupt you from time to time with further questions.

A. I think I should first say something about the early period preceding the franchise on February 5, 1923. Preceding 1920 the Rodeo-Vallejo Ferry Company operated on a long water route from the City of Rodeo, through Mare Island Strait to docks in the Port of Vallejo. They were threatened because of the building of a Six Minute Ferry from Valona to Morrow Cove on a short run across the Ca. juinez Strait at its western end. For that reason the Rodeo-Vallejo Ferry Company moved its southern ferry slips from the City of Rodeo farther east to what they call I remember, the short-way pier between Oleum and the Selby Lead Works. That shortened their route but they still ran to the City of Vallejo. There was keen competition which nearly broke the Rodeo-Vallejo Ferry Company but promptly bankrupted the Six Minute Ferry Company. So in the period about 1920 the Rodeo-Vallejo Ferry Company bought the bankrupt properties and got possession of the lands along the water front both at Morrow Cove on the north and at Valona on the south strait.

Q. Those were the properties formerly owned by the

Six Minute Ferry Company?

A. They were. I speak of that because that later became a very important fact. The law at that time required a bridge franchisee to own its water terminals. Thus the Rodeo Ferry was able to change its water route to its final position that they continued until the bridge was completed in 1927. That is, it operated from slips at Oleum [fol. 562] to Morrow Cove. The reason the Ferry Company did not use the southern slips of the Six Minute Ferry was that the highways were in very, very poor condition between Oleum and Crockett, and also I might say at this time that the highways from Morrow Cove to Valona were nothing to be proud of. In fact, that was in the early days of highways throughout the State, and the Carquinez Bridge I think I may properly say invited an early improvement of highways between Oakland and Sacramento. Under those conditions, by 1922 the traffic of the Rodeo-Vallejo Ferry Company began to increase and the property was looked upon as a valuable property. So a number of other groups came into the field and threatened its property existence.

Q. Those other groups, I take it, were applicants for tranchises for the construction of bridges at some points

across the Carquinez Straits?

A. It turned out there were two such companies in the first instance and they proposed in the summer of 1922 of apply for bridge franchises at the east end of the Strait, and the reason for that was that the laws of those times prevented a competing property within two miles of an existing utility, whether bridge or ferry. They had the lisadvantage, as I know definitely and can prove, of having a site that was undesirable.

Q. That site would be at least two miles east of the ocation of the present bridge, I take it?

A. And where there were no highways on the north side and the land, if you will examine it to this day, is four of five hundred feet high and it would have been a very difficult approach. Nowhere on the south side—and in fact, here was discussion at that time by the San Francisco fol. 563] Transit Company that they would find a way brough to Franklin Canyon, which would have meant differ steep grades or very circuitous connections or a ery expensive tunnel.

Q. Can you give us the names of those rivals without going into too much detail concerning them? Who were

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these various aspirants for bridge franchises?

A. Well, I will try to be brief. Because of these friends the Rodeo-Vallejo Ferry Company on September 19, 1922 amended its articles of incorporation and applied for a franchise to the Contra Costa Supervisors. About a week earlier, on September 14, 1922, the San Francisco Transit Company asked for a franchise at the east end of the Strait for a suspension bridge, and a second company of the same date, September 14, 1922, called the Dillon Point Development Company, asked for a franchise practically in the same location, slightly east of the Transit Company. I will say, too, that those rival companies had very powerful backing, particularly as I observed it, from the actions in the hearings before the Supervisors, around the navigation interests, and they continued that opposition throughout the formative period up to say January 1, 1924, and caused the Ferry Company which later became the Bridge Company, a great deal of expense in litigation and in other ways and many delays.

Now, at that same time, to be specific on March 5, 1923, even after we had a franchise, in February, the Crockett Land & Cattle Company became a third applicant. They received no franchise from the Supervisors. I should say that the Crockett Land & Cattle Company was owned by Mr. Hannah, who possessed the land on which we ultimately built piers 10 and 11, and he kept us off of that land until [fol. 564] a year after the franchise. We had to go to court. I wish to be very specific on that point and probably

will be later on.

And lastly, so late as July 27, 1923, a new company was formed called the Northern California Development Association which, if my memory serves, contained some of the men from the San Francisco Transit Company, and they presented and forced an initiative petition before the Contra Costa Boa; d of Supervisors demanding and asking for a bridge franchise which, after a formal hearing, the Supervisors denied, and the case was carried to the Calfornia Supreme Court and dismissed. I think after that we had no further opposition in the sense of having competing companies demanding franchises.

Q. However, you did have opposition of other types, did

you not?

A. Very decidedly. Some was opposition and the other ras really friendly, may I call it, cooperation in the sense t determining to what extent we might have access or asements over their lands. Before I speak of that, along November and December, 1922, it began to appear that he Rodeo-Vallejo Ferry Company had the best chance o receive a franchise because of the evidence submitted, and he navigation companies became powerful in objection, rincipally the Matson Navigation Company and the Caliornia-Hawaiian Sugar Refining Company. In all fairness those two groups I must say that they were most strenuous their opposition throughout the entire life of the contruction period, until we finally put the navigation lights a the completed fender in February, 1931. They caused s a great many delays and a great deal of expense and tigation, many hearings not only before the Supervisors fol. 565] but before the War Department and also before ne State Engineer of California, for reasons which, I can rolain.

Q. And was this opposition responsible for some of the clays in securing the necessary permits from the War

epartment?

A. Very decidedly. Their opposition caused us to make any different plans, many surveys, in order that we could ellect data to be submitted with our application for permit, and these data were requested by the Chief of Engineers Washington. I can speak of that in great detail if dered.

Q. Well, you have referred so far to some of the initial fliculties and obstacles and to the time necessary to secure e franchise from the Board of Supervisors of Contrasta County and you have just touched slightly on the War epartment situation. Now, can you develop some of the

rly history of the project a litle further?

A. Yes, sir. So far I have attempted to give a brief sture of that early period between September 22, 1922, ten I became the chief engineer, and the time that I ally received our first War Department permit on April 1923. Now, that was a very strenuous period and only use who were on the site, so to speak, know how much rk was done of an engineering and even a construction ture. We had to make surveys, which were very exastive, on both sides of the Strait in order to triangulate I locate the probable piers; we made current measure-

ments in the Straits, all of which required equipment which was very expensive; we made plans galore, as I will show. We had many hearings before the Supervisors and a number of hearings in November, December and as late as March, 1923, before the War Department. All of that re-[fol. 566] quired a staff. So on January 24, 1923, I appointed my chief consulting engineer, William H. Burr, who had been my teacher 30 years before and of whom I spoke vesterday. He is a national bridge engineer and gave us much help in the later financing because of his connections in New York City. On May 11, 1923, after we had a definite permit, I appointed my chief designing engineer in New York, Mr. David B. Steinman. We had designing offices both in New York, near Mr. Burr, and designing offices at Crockett. I should say, too, that in this early period I finally selected the late Mr. George J. Calder, who became my resident engineer throughout the work and after I retired as chief engineer he became the chief engineer of the American Toll Bridge Company and a vice-president later, on the Board of Directors. I should say, too, in that early period that as early as November, 1922, I prevailed upon the Company to let me select the most prominent geologist, because the engineers and experts of the San Francisco Transit Company particularly began to attempt to prove that the Franklin fault ran through our bridge. So Mr. Lawson was appointed the geologist. He was later geologist both for the Bay Bridge and the Golden Gate Bridge.

Q. That was Professor Lawson of the University of

California?

A. Yes, sir. He made finally his geological report, as I recall it, in August, 1923, and in the previous 3 or 4 months he supervised the diamond drill borings and other

foundation explorations.

Of course, I had in addition a large staff of assistants to do the surveying and all the detail work and, of course, men to operate tugs and to build the construction wharf [fol. 567] at Valona which became the base of my operations and my western offices for engineering.

I think, then, I should say something about plans. Between October, 1922, and February, 1923, with this organization that I have described, I prepared for the hearings before the Supervisors no less than five different plans for crossing the Strait at Valona. Three of these were

suspension types, suspension bridges, and two were cantilevers. After two or three hearings, in December of 1922, the California-Hawaiian Sugar Refining Corporation and the Matson Navigation Company finally presented their very strenuous view as to where the piers might be and what the spans should be and the clearances, and they criticized my five original plans which were presented in the early days both to the Supervisors and the War Department in November, 1922. And I think I should read a clause from their final letter during these negotiations. The letter was dated January 4, 1923, and was addressed to the Supervisors of Contra Costa County and, as I recall, it was on the Sugar Company's rather than the Matson Company's letterhead. And this is the clause which I wish to emphasize. They said that they would not object to a bridge such as we finally built provided "The first, southern pier, water pier, should be placed wholly within the south pier head line of the Strait," and they at that time defined that south pier head line in their own language because the War Department had not vet officially established it. They said that south pier head line should be a straight line or within a straight line drawn from the northwest corner of the California-Hawaiian Sugar Refining Corporation's wharves and to a point at the north-[fol. 568] east corner of the Selby Wharf and "with the next pier north not less than 1000 feet northerly from the pier last described".

Q. What was the effect of a requirement of that character on your work?

A. Well, it fundamentally changed the designs for the suspension bridges because I had thereby to use a much longer central span which greatly increased the cost of the suspension bridges. You see, I had to have a tower pier on the south pier head line and then the next pier had to be near the other shore. And as I will explain later, if desired, I finally selected the span of 1950 feet, which at that time was the longest span of any that had yet been attempted, because in the Philadelphia bridge the span was 1750 feet, and we were having enough objections—experts were saying we never could build the bridge even if we had the money because we could not build piers in such deep water and in such swift currents, and they gave us a lot of trouble with financing and in many other ways because we were in a pioneer position. The people

of this community, in Northern California, were not bridge minded and we had to overcome the inertia of public opinion. And with experts telling the public we would never finish the bridge even if we were serious, it was very hard going we will say. Other than that, there were other groups who were proclaiming from the house tops that we were not seriously intending to build the bridge but were determined to prevent these two other companies from building bridges at the east end of the Strait. So the Supervisors at the hearing in January, 1923, accepted this, as I will call it, dictum of the navigation interests. I then proceeded to [fol. 569] revise these previous plans and immediately in February presented to the Supervisors two plans, one for a suspension bridge with a 1950-foot central span and the other design was, with very, very minor details, the bridge as I actually built it and as it exists today—a cantilever bridge with two main openings of 1100 feet each and the crucial center pier which became the object of great attack and which is the key to the entire construction and later required long discussion with the War Department, in the face of the opposition, as to what should be the proper fender in that swift tidal stream, deep and with tides both ways and with ocean-going vessels.

So in March of 1923, after the Supervisors had given us the franchise, since both designs satisfied all of the objectors, we renewed the so developed permit applications to the War Department. I should say we made our first applications in October, I think it was, 1922, and, as developments occurred we submitted the developing and subsidiary data. And Mr. Hanford, the president of the Ferry Company, and myself then jointly signed the reflewed applications in March, 1923.

Q. As I understand it, it took almost six months to get the first War Department permit after you made application for it?

A. And with very much cost, not only for the construction equipment I needed and the docks I had to build and the engineers I had to employ, but we had many lawyers, too, and they were our chief expense.

Q. I take it, then, Dean Derleth, you can not build a bridge at this time with one day's notice and have everything ready to start on one day?

A. No. I said yesterday that I was fortunately a member of both the Golden Gate and the Bay Bridge Boards

[fol. 570] and I have been on many bridge projects and we always spent lots of money and consumed lots of time and we met much opposition on every project, and the history, if I gave it to you here, of the two great bridges

in San Francisco Bay would prove my statement.

of waiting on our part, grant us a permit on April 17, 1923. And I consider that date the beginning of our real energies in preparing what I call contract plans and in getting very expensive information, such as the diamond drill borings and other exploration data for the basis of these design plans. And I think I have a right to some pride in saying that we did all of that work and completed these stupendous plans on a pioneer work, against opposition, in a short period and we signed all the plans, what I call the contract plans, in November and December, 1923.

Q. Well now, I will ask you whether you happen to have a few photographs that may be illustrative of some of the work done during this earliest period concerning which

you have testified?

A. Yes, sir, I have a lot of photographs here. Fortunately, as we look back, I took progress photographs very generously. I think we took 2000 photographs that are of record.

Mr. Derleth, do you first have a photograph which is marked "2" entitled "View of boring machine, May 10, 1923"?

A. Yes, sir. Let me say that I began expensive boring perations on April 2, 1923, 15 days before we had any dea when we would get a franchise.

Mr. Thelen: If the Commissioner pleases, in connection fol. 571] with each of these photographs, I think as I efer to each by number and designation I will ask that the introduced in evidence and given an exhibit number that the record may show clearly what the witness testifying to. I will ask that this photograph which is marked "2" and entitled "View of boring machine, May 0, 1923," be introduced in evidence as Exhibit No. 1 of the American/Toll Bridge Company.

Commissioner Riley: It will be Exhibit 24.

Mr. Thelen: Have you another photograph numbered 6" which is entitled "Boring machine at Pier 5, May 15, 123"?

A. Yes, sir.

Mr. Thelen: I ask that that photograph be marked as the next exhibit, No. 25, of the American Toll Bridge Company.

Commissioner Riley: It will be marked as respondent? Exhibit No. 25, so received by the Commission.

Mr. Thelen: Have you comments concerning that photograph, Mr. Derleth? By the way, Mr. Derleth, you have had pinned on the blackboard a blueprint, and for purpose of identification, will you read the legend which appears at the lower righthand corner?

A. The title of this sheet is "Proposed highway bridge across Carquinez Strait, California, from Valona to Marrov Cove, revised application by the Rodeo-Vallejo Ferry Company, Aven J. Hanford, President, C. H. Derleth, Jr., Chief Engineer, William H. Burr. Consulting Engineer, October 17, 1923".

Q. And was that prepared under your general supervision?

A. That drawing shows the bridge as finally developed in the contract plans after the permit of April 17, 1923. [fol. 572] Mr. Thelen: We ask that that blueprint be introduced as Respondent's Exhibit 26, I think it is.

Commissioner Riley: If no objection it will be received and marked Exhibit 26 by the respondent.

Q. Was it necessary at a subsequent time to tear down that structure of the Six Minute Ferries?

A. We had to tear it down, tear down about half of it, from a point somewhat south of the picture in photograph No. 6 and all the way to the location of Pier 4, a distance of some 700 feet. The reason we had to tear it down was that it was in the way of the construction of Pier 5, also Pier 6 and it was in the way of the erection of false work for the south anchor arm and it was in the way of Pier 4.

Q. Have you examined Railroad Commission's Exhibit No. 3 prepared by Mr. Mitchell?

A. I read it very carefully.

Q. Did you find in that any item of cost for the tearing down of that trestle?

A. No, sir.

Q. Have you another photograph numbered 11 and entitled "Diamond drill at Pier 4, May 24, 1923"?

A. Yes, sir.

Mr. Thelen: We ask that that photograph be marked as Respondent's Exhibit No. 27.

Commissioner Riley: It will be so received.

Q. Now, have you another photograph, No. 26, entitled "Preparing casing for diamond drill at Pier 3, June 27, 1923"?

A. Yes, sir.

Mr. Thelen: We ask that that photograph be marked Respondent's Exhibit No. 28.

Commissioner Riley: It will be so received.

Mr. Thelen: Please proceed.

[fol. 573] A. Photograph No. 26, dated June 27, 1923, shows the floating equipment out in the middle of the Strait at the site of Pier 3, the central tower, which I will call the crux of the construction. The water there when we started was 80 feet deep and later with scouring reached a maximum depth of 115 feet and in very soft ground with rock at a depth of 135 feet.

Q. By the way, what was the speed of the current there

in the Carquinez Straits?

A. It usually ranged between 5 to 7 feet per second but on rare occasions it reached 9 feet.

Q. Is that a normal speed in connection with water operations or not?

A. No, it is a very high speed.

Q. How does it compare with comparable speed in this

icinity, do you happen to have figures available?

A. It is slightly higher than the speeds we got at the lolden Gate Bridge and very much higher than the speeds f the Bay Bridge.

Q. Well, I am interrupting you, but may I ask you anther question? You spoke of this work being done by uncanson & Harrelson people on a cost plus basis; would have been feasible to have had this work done under a unp sum contract?

A. Not at that period.

Q. Looking back now over the arrangement that was ade with the Duncanson-Harrellson people, Mr. Derleth, to you satisfied that, from the Company's point of view, arrangement was a fair and reasonable one?

A. It was not only reasonable but unprecedently reason-

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Q. Referring to this diamond drilling, I believe you have a photograph, No. 31, which is entitled "Diamond drill at Pier 3-B, July 5, 1923"?

A. Yes, sir.

Mr. Thelen: May we have that marked as Respondent's Exhibit No. 29?

[fol. 574] Commissioner Riley: It will be received as Bespondent's Exhibit No. 29.

Q. Now, have you another photograph relating to diamond drilling, No. 37, entitled "Quadruple casing for diamond drill, August 2, 1923"?

A. Yes, sir.

Mr. Thelen: May we have that marked as Respondent's Exhibit 30?

Commissioner Riley: That will be received as Respondent's Exhibit No. 30.

Mr. Thelen: Will you please comment on that photograph?

A. Photograph No. 37, August 2, 1923, shows a tug boat taking a Haviside barge, a very large structure, out to Pier 3. It is leaving the construction dock, and on the barge, the Haviside barge or derrick, you see one unit of that multiple pipe, quadruple pipe shell, which is being taken out in the Strait to be driven for the next diamond drill in the manner that I have already described.

Q. I take it from the photographs that have been already introduced that you used a great deal of heavy equipment,

barges and other equipment of that character?

A. Very expensive.

Q. Did you, in looking over the Railroad Commission's Exhibit No. 3, find any of that equipment set out definitely so that it could be identified?

A. No, sir.

Q. Was any time consumed in connection with condemnation proceedings and in connection with securing easements from the Southern Pacific Company across their right of way?

A. I said that we had completed the contract plans in record time. I think that is true. But I think we could have completed it more rapidly if we had not been in the [fol. 575] pioneer period and if we had not had to get ease-

ments and buy land for our approaches as well as for some portions of the main bridge.

Q. It was necessary, then, was it, to go through a condemnation suit before the right to utilize that land could

be secured?

A. Yes, sir, before a jury in Martinez, and the verdict was rendered in our favor for a very small sum of money—I think it was less than \$12,000—on October 25, 1923. But the Judge instructed us we could not trespass on the property until after November 2, 1923. So I was unable to make any foundation examinations of that property until after that date, November 2, 1923. And, what was more important, I could not proceed with my claims for an easement over the Southern Pacific property and I could not design the final details of this viaduct.

Q. Suppose that some one had planned to start this Carquinez Bridge on a day, say, November 30, 1924; could all of these matters to which you have referred been ac-

complished the next day?

A. Certainly not.

Q. Is there any reason to suppose they would have taken any less time if you started on November 30, 1924,

than starting on the day on which you started?

A. I shall be immodest. With the help of Mr. Aven Hanford, who was a driving force, the president of the Rodeo-Vallejo Ferry Company, I did all of this work, I think, with able assistants, quicker than it is normaldone; and I ought to know, I have had experience with other work.

Q. You have one or two photographs, have you not, which illustrate the character of the ground at that point?

A. Yes, sir.

[fol. 576] Q. One of which is No. 832, is it not, dated March 20, 1926, and entitled "Valona slide from hole No. 1"?

A. Yes, sir.

Mr. Thelen: I would like to have that photograph inroduced as Respondent's Exhibit No. 31.

Commissioner Riley: It will be received and marked to 31.

The Witness: Photograph 832 is taken somewhat west of ur bridge head and shows a piece of the old highway in

those days and indicates what the ground looked like that was moving down into the Strait and over the Southen Pacific right of way.

Q. Have you another photograph, No. 1337, which has on it the legend "Drains, beam reinforcing, Valona slide work July 8, 1927"?

A. Yes, sir.

Mr. Thelen: We ask that that photograph be introduced and marked Respondent's Exhibit No. 32.

Commissioner Riley: It will be so received and marked

Respondent's Exhibit 32.

Mr. Thelen: Do you desire to comment on that photo-

graph?

A. Photograph 1337 shows the region where the State Highway Department and also the Southern Pacific Company removed mountains, I call it, of earth to take weight off of this hill and they drained it underneath and also on the top.

Mr. Thelen: We next offer in evidence, Mr. Commissioner, photograph No. 61 which is entitled "Office building, December 3, 1923", and ask that that take Respond-

ent's Exhibit No. 33, I think it is.

Commissioner Riley: 33 is correct; so received and noted

Respondent's Exhibit 33.

[fol. 577] Mr. Thelen: We ask that the photograph numbered 84 which is entitled "Looking south along existing wooden viaduct between Piers 4 and 5, January 22, 1924," be introduced and marked Respondent's Exhibit 34.

Commissioner Riley: So received and marked Exhibit

34 by the Respondents.

Q. Have you another photograph along the same line

A. The next one is dated September 12, 1924, and is entitled "Present bridge and false work for new bridge over S. P. tracks".

Mr. Thelen: We have that introduced as Exhibit 35! Commissioner Riley: So received and identified as Exhibit 35!

hibit 35 of the Respondent.

Mr. Thelen: May we have this photograph No. 330, which is entitled 'Building new timber trestle, October 1, 1924," introduced and marked Exhibit No. 36, Mr. Commissioner.

Commissioner Riley: It will be received and noted as

Exhibit 36 of the Respondent.

Mr. Thelen: We ask that photograph No. 355 which is marked "Construction wharf, October 4, 1924," be introduced and take Exhibit No. 37, I believe, of Respondent.

Commissioner Riley: It will be received and marked Ex-

hibit 37 of the Respondent.

Mr. Thelen: Next we offer, if the Commission please, No. 366, which is a photograph entitled "Construction wharf, October 20, 1924," and we ask that that take No. 38, of Respondents.

Commissioner Riley: It will be received and marked Ex-

hibit 38 of the Respondent.

[fol. 578] The Witness: The next is a composite view of four pictures, Nos. 384 to 387, inclusive.

Mr. Thelen: We ask that this composite picture be in-

troduced and take our Exhibit No. 39.

Commissioner Riley: It will be received as Exhibit 39. Perhaps "Panorama" would be a better description of it, wouldn't it?

Mr. Thelen: Yes, that would be more accurate.

Q. Assuming that wharf and the additions to which you referred cost the Company approximately \$84,000, I will ask you from your long experience as to whether such a wharf would be included by engineers in the cost of excavation at so much per cubic yard, or the cost of concrete at so and so much per cubic yard? Have you ever run into such a situation?

A. That would be a very academic way to attempt to solve that question of cost. If, for no other reasons, in a great bridge you have more than one contractor and you have work progressing simultaneously, and it is much better and, so far as I know, it is always wisely done this way, that you lump this cost by itself as an item.

Q. Where you can see it and put your finger on it?

A. Yes.

Mr. Thelen: We ask that photograph No. 488 which is labeled "Addition to construction wharf, January 9, 1925," be introduced as Respondent's Exhibit No. 40.

Commissioner Riley: That will be received as Exhibit

40 of Respondent.

Mr. Thelen: May we ask that that photograph No. 501 which has on it the legend "Construction wharf, January 26, 1925," be introduced as Respondent's Exhibit 41.

[fol. 579] Commissioner Riley: It will be received as Re-

spendent's Exhibit 41, by the Commission.

The Witness: I ordered picture 501 because on February 1, 1925, we entered what is termed the interim agreement with the Raymond Concrete Pile Company and I wanted evidence to show just what was the status of all our work and this is only one of about 40 photographs, as I remember it, that I had taken in the last week of January, 1925, to show the progress of Duncanson & Harrellson throughout the work and, of course, including some of those smaller contracts like McGill's excavation at Pier 1. This picture, perhaps better than the composite photograph of October 29th, shows the fruition of the Duncanson-Harrellson work and the essential completion of our base of operation.

Q. Now, as far as you have told us the story so far, up to January 26, 1925, the principal contractor was Duncanson & Harrellson?

A. Except for the small pieces of work done by McGill.

Q. You have been just speaking of work which the Duncanson & Harrellson people did on various piers, and I think you referred to piers 1, 2, 3, 4, 5, 6, 7 and 8 and perhaps some others. Do you have photographs which will show the situation at each of those piers?

Mr. Thelen: We ask that that photograph which is entitled "Concrete mixer at Pier 1, Anchor Day, September 29, 1923," be introduced and marked Respondent's Exhibit 42.

Commissioner Riley: It will be so received and noted.
Mr. Thelen: The photograph which bears the legend
'Concrete forms at Pier 1, Anchor Day, September 29,
1923,'' we ask be marked Respondent's Exhibit 43.
[fol. 580]. Commissioner Riley: So received and marked as Exhibit 43.

Mr. Thelen: Does that photograph give any indication of the type of excavation that was necessary in connection with Pier 11

A. It does. It shows the rock excavation, alternate layers of sandstone and shale which break into unequal blocks.

Q. In your judgment, was the price of \$1 per cubic yard adequate for that type of excavation at that time?

A. Not unless you consider various other items separately, because it should be apparent from what I have been

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aying that this pier was in a very isolated position and verything had to be brought to it; equipment, even water ipes had to be constructed, power had to be brought in from distance. You don't do rock excavation and trim it and hape it for \$1 per cubic yard.

Q. Have you also a photograph numbered 145?

A. Yes, sir.

Q. Would you like to refer to that next?

A. Yes.

Mr. Thelen: We offer this photograph numbered 145 and aring on it the legend "Wind bracing anchorage for Pier April 29, 1924", and ask that it be introduced as Respondt's Exhibit No. 44, I think.

Commissioner Riley: It will be so received and noted as

khibit No. 44.

The Witness: This picture shows one of the three pieces structural steel, or a portion of the three assemblages, is the wind anchor that sets on the middle of the shelf Pier 1 and to which at later dates the American Bridge appany anchored the horizontal floor framing to brace superstructure laterally. It was imbedded in the pier, of 581] all except that top portion which sticks out, and to be seen to this day on the shelf of the pier.

Mr. Thelen: Have you examined the estimate for Pier Railroad Commission's Exhibit No. 3?

A. I have.

Were you able to find in there any reference to that

horage?

L. The author of Exhibit 3 apparently was not aware this structural steel. It is not in the estimate and it is y part of that total purchase by the American Toll-dge Company in 1923—structural steel not only for piers at 5, as already stated, but also the heavy anchor bolts Piers 2 and 3 and for Piers 6, 7, 8, 9, 10, 11 and 12. It material was purchased, and I had my designing ineer, Steinman, in New York prepare special drawings hat time and we got bids for that steel in these early in the steel in these early in the steel in the s

Were you able to find any of that material in the road Commission's Exhibit No. 3?

No, it does not appear anywhere; apparently the or felt that all of this was in the final American Bridge pany contract of April, 1925.

Q. And as you have testified, that was not the fact!

A. It is not the fact.

Q. Would you like to refer to 147 next?

A. 147, yes.

Mr. Thelen: May we ask that photograph numbered 147 and entitled "Pier 1, looking west, May 9, 1924," be introduced and take Exhibit No. 45?

Commissioner Riley: So received and marked.

Mr. Thelen: Next we offer No. 153, bearing on it the legend "Setting wind bracing anchorage at Pier 1, May 20, [fol. 582] 1924," and ask it be introduced and take Respondent's Exhibit No. 46.

Commissioner Riley: So received and noted as Exhibit 46.

Mr. Thelen: This steel in the middle of the photograph is technically called structural steel, as distinguished from the reinforcing bars, is that right?

A. That is right.

Q. I take it you were unable to find that piece of structural steel in the Commission's Exhibit No. 3?

A. No, it is not in evidence in the estimate, nor is its

sister piece on the other end of the pier.

Q. I understood you just to refer to back-filling in connection with Pier 1. Were you able to find any item for back-filling in connection with Pier 1 in Railroad Commission's Exhibit No. 3?

A. No. Numberless items of that character throughout that Table 2 of Exhibit 3 are lacking and, as I have heard here in evidence, assumptions were made that unit prices include these things.

Q. Would engineers normally in making estimates of this type in which there is back-filling, Mr. Derleth, include it

in some other item?

A. I think not; it is not the way to make an estimate, and particularly if you were the engineer for the contractor. He would either lose money or you would lose your job.

Q. Now, if you will kindly turn to Piers 2 and 3, you have some photographs illustrative of those piers also, I take it?

A. I have a considerable number of photographs. These are, after all, the crucial piers of the bridge. The first photograph is No. 242.

Mr. Thelen: We ask that that photograph which has on it the legend "Steel cutting shoe, caisson pier 2, August 1," [fol. 583] 1924," be introduced as Respondent's Exhibit No. 47.

Commissioner Riley: So received and marked Exhibit No. 47.

Mr. Thelen: We next ffer No. 243, which is entitled. "Steel cutting shoe, caisson Pier 2, August 1, 1924," and ask that it be admitted as Exhibit No. 48.

Commissioner Riley: So received and noted.

Mr. Thelen: We ask that this photograph, which does not have a number on it and which is entitled "Caisson Pier 2, September 10, 1924." be introduced and take Respondent's Exhibit No. 49, if that is correct.

Commissioner Riley: That is correct; so received and

noted as Exhibit 49 of Respondent.

Mr. Thelen: We ask that this photograph which is entifled "Floating caisson, Pier 2, September 29, 1924," be introduced and marked Respondent's Exhibit No. 50.

Commissioner Riley: It will be received as Exhibit No.

50 and so noted.

Mr. Thelen: We ask that the photograph which is numbered 339 and dated October 6, 1924, and which is entitled "Pile driver for setting guide columns Piers 2 and 3" be introduced as Respondent's Exhibit 51.

Commissioner Riley: It will be received and so noted as

Exhibit 51.

The Witness: Photograph 339 shows the great railroad barge to which I have several times referred. You will see the two railroad tracks on it when it was used by the Southern Pacific Company for freight cars. On one end you will see the pile driver which rises over 100 feet high and which was used for setting and driving the great steel [fols. 584-585] guide columns of the guide frames at Piers 2 and 3. There were six of these guide frames which had to be built, of course. You will see various equipment in the neighborhood. All of this equipment was very heavy and very expensive.

Mr. Thelen: Were those guide columns and the driving hereof items of rather major importance?

A. Decidedly so, and very unique.

Q. Were you able to find in Commission's Exhibit 3 under her No. 2 any reference to these items?

A. None whatever.

Mr. Thelen: We ask that photograph 690, dated August 25, 1925, entitled "Pier 2-W, setting northwest guide column, August 25, 1925", be introduced and marked Respondent's Exhibit 52.

· Commissioner Riley: It will be received and marked Ex-

hibit 52, and so noted.

[fol. 586] Mr. Thelen: We ask that the photograph under date of October 13, 1924, having on it the legend "Caisson one, October 11, 1924," be introduced and marked Respondent's Exhibit No. 53. It bears no number.

Commissioner Riley: It will be received and noted as

Exhibit 53,

Mr. Thelen: The next photograph dated October 11, 1924, has on it the legend, "One of the anchors to be used in holding caissons of center piers". We ask that that be introduced and marked Respondent's Exhibit 54. This particular photograph does not have a number.

Commissioner Riley: It will be received and noted as

Exhibit 54 of Respondent.

Mr. Thelen: We next ask that photograph No. 377, dated October 24, 1924, having the legend "Setting anchors for caisson one," be introduced and marked Respondent's Exhibit 55.

Commissioner Riley: It will be received as Exhibit 55, 80 noted.

Mr. Thelen: We next ask that photograph No. 391, dated October 29, 1924, having on it the legend, "Caisson one" be introduced as Exhibit 56.

Commissioner Riley: So received and noted, Exhibit 56. Mr. Thelen: We next ask that the photograph numbered 408, dated November 10, 1924, and having on it the legend "Caisson one", be introduced and marked Respondent's Exhibit 57.

Commissioner Riley: So received and noted.

Mr. Thelen: We new ask that the photograph which is numbered 412, which is dated November 10, 1924, and which has on it the legend, "Steel guide columns for cassions of [fol. 587] Piers 2 and 3", be introduced and marked Respondent's Exhibit 58.

Commissioner Riley: So received and noted.

Mr. Thelen: We now ask that the photograph which has on it No. 414 and which is dated November 12, 1924, bearing the legend, "Steel guide column, Piers 2 and 3", be received an marked Respondent's Exhibit 59.

Commissioner Riley: So received and noted.

Mr. Thelen: Next we ask the photograph which is numbered 417, dated November 14, 1924, and which has on it the legend, "Steel guide column, Piers 2 and 3", be introduced and marked Respondent's Exhibit No. 60.

Commissioner Riley: So received and marked Exhibit 60.

The Witness: View 417 is a heroic picture; it shows one of these huge steel columns in the guide frame and on floating equipment ready to be driven.

M. M. V. TT. A. J. Al. A. Al.

Mr. Thelen: We next ask that the photograph which is numbered 418, dated November 14, 1924, and which has on it the legend, "Setting guide column at Pier 3-B-W", be introduced and marked Respondent's Exhibit 61.

Commissioner Riley: So received and noted as Exhibit

61.

Mr. Thelen: We ask that the photograph numbered 421 and dated November 17, 1924, and bearing the legend "Anchorage system Pier 3-B-W" be introduced and marked as Respondent's Exhibit 62.

Commissioner Riley: So received and noted as Exhibit

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Mr. Thelen: I take it from what you have just said and from some testimony that you gave earlier that the anchorage system was rather an important part in connection with the construction of the bridge?

A. It was a major operation.

fol. 588] Q. May I ask you whether you were able to ind in Railroad Commission Exhibit 3 any reference to

ny cost of any anchorage system?

A. None whatever except that in Exhibit 3—well, there some reference in the construction of the fenders to ms not accounted for; but if L am not mistaken, it refers the possible cost of temporary ship fenders. There is reference whatever in Exhibit 3 to the work of these nide frames at six places, or the cost thereof.

Mr. Thelen: We ask that photograph numbered 457 and ted December 17, 1924, and bearing the legend, "Anchor ame, Pier 3-B-W", be introduced next as Respondent's thibit 63,

Commissioner Riley: So received as Exhibit 63.

Mr. Thelen: We now ask that photograph No. 460, dated cember 18, 1924, and bearing the legend "Towing caisson

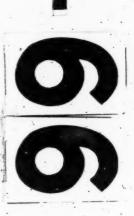
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one to Pier 3-B-W" be introduced and marked Respondent's Exhibit No. 64.

Commissioner Riley: It will be received as Exhibit 64. The Witness: View 460 was another historic accomplishment December 18, 1924. On that date we towed the first caisson into place. I speak of this with some feeling, as the chief engineer, because it was predicted the tides would take it away from us and smash the guide frame. We succeeded. I think the picture speaks for itself as to the heroic nature of the work. That sort of scene was repeated six times.

Mr. Thelen: We now ask that No. 468, dated December 23, 1924, and bearing on it the legend, "Driving guide column, Pier 3-B-W", be introduced as Respondent's Exhibit 65.

Commissioner Riley: It will be so received and noted [fol. 589] Mr Thelen: We now ask that No. 489, dated January 9, 1925, and entitled "Pier 3-B-W" be given our next Exhibit number, which I believe is 66.

Commissioner Riley: It will be received as 66, so noted Mr. Thelen: We now ask that photograph No. 493, dated January 15, 1925, and entitled, "View from north side of Strait, showing anchorage system at Pier 3-B-W", be introduced and marked Exhibit 67.

Commissioner Riley: So received and noted.

Mr. Thelen: We now ask that No. 497, dated January 19, 1925, and entitled "Anchor barge, Pier 3-B-W", be introduced as Respondent's Exhibit No. 68.

Commissioner Riley: Received and so noted as Exhibit

68 of the Respondent.

Mr. Thelen: May I now ask you, looking at that photograph, whether or not it was necessary in connection with these anchor barges, during the period of construction to have the lighting and fog bell installations?

A. At all times on all floating equipment, particularly if it was fixed as this would be for a period in the navigation lanes, not only the War Department but the superintendent of the light house service of the Department of Commerce constantly had inspectors on hand who would instruct us what we must do. You will notice in similar pictures that we have a post there like a telephone pole and on it the regulation signals, lights, and in daytime the discs of different colors. You see also a bell for the foggy

days. Those requirements were very numerous and costly throughout the construction period and, of course, later on [fol. 590] the fixed bridge and its fender there are expensive fog signals and lights and even beacons on the high towers for airplane guidance.

- Q. In your judgment, is the cost of these lighting signals and fog signal systems and so on properly to be taken

as part of the construction cost?

A. Certainly.

Mr. Thelen: We ask that No. 499, dated January 21, 1925, and bearing the legend "Setting anchor east of Pier 3-B-W", be introduced and marked Respondent's Exhibit No. 69.

Commissioner Riley: It will be received and noted as Exhibit 69.

Mr. Thelen: We next ask that photograph No. 502, dated January 23, 1925, and marked "Pier 3-B-W" be introduced

as Respondent's Exhibit No. 70.

Commissioner Riley: It will be received as Exhibit 70. The Witness: This picture is the last of a series indicating the Duncanson & Harrellson work at Pier 3. The next picture will illustrate the interim agreement with the Raymond Company.

Mr. Thelen: We next ask that photograph No. 528 under date of February 18, 1925, and marked "Pier 3-B-W" be introduced and marked Respondent's Exhibit No. 71.

Commissioner Riley: So received as Exhibit 71.

The Witness: This view shows the state of the work when the Missouri Valley Bridge & Iron Company, the subcontractor to the Raymond Company, took over the work.

Mr. Thelen: We next ask that photograph No. 691, dated August 25, 1925, and which bears the legend "Pier 3-B-W, manifold for jet system, west side" be introduced and marked Respondent's Exhibit 72.

[fol. 591] Commissioner Riley: So received and noted,

Respondent's Exhibit 72.

Mr. Thelen: And, as a matter of fact, the jet system is essential in connection with caisson construction, is it not?

A. Yes, sir.

Q. Were you able to find any reference to the jet system in Railroad Commission's Exhibit 3?

A. None.

Mr. Thelen: We now ask that the photograph numbered 781, dated December 21, 1925, and bearing on it the legend "Diver working on launching ways", be introduced and marked Respondent's Exhibit 73.

Commissioner Riley: It will be received as Exhibit 73.

The Witness: View 781 shows many pictures of divers which we used, not only used at the launch ways but also at Piers 2 and 3 and at Pier 4. Divers were used at various times throughout the work at these piers.

Mr. Thelen: May I inquire, Mr. Derleth, as to whether you have been able to find in Railroad Commission Exhibit 3 any reference either to the cost of launching ways

or the cost of divers?

A. None whatever.

Mr. Thelen: We now ask that the photograph No. 65, which is dated December 12, 1923, and which has on it the legend "Concrete piles for Pier 4, Standard Supply Company yard, Oakland", be introduced and marked Respondent's Exhibit No. 74.

Commissioner Riley: It will be received and noted as

Exhibit 74.

Mr. Thelen: We ask photograph numbered 96 and dated February 13, 1925, bearing on it the legend "Pier 4 looking east" be introduced and marked Respondent's Exhibit 75. [fol. 592] Commissioner Riley: So received and noted, Exhibit 75.

Mr. Thelen: We next offer in evidence photograph No. 100, dated February 18, 1924, labeled "Pier 4 looking east"

and ask that it be marked Respondent's Exhibit 76.

Commissioner Riley: Received and so noted, Exhibit 76. Mr. Thelen: We next ask that photograph No. 102, dated Febuary 19, 1924, and marked "North side of cofferdam, Pier 4", be introduced and marked Respondent's Exhibit No. 77.

Commissioner Riley: So received and noted, Exhibit 77. Mr. Thelen: We next ask that photograph No. 111, dated February 21, 1924, and bearing the legend "Lowering cofferdam Pier 4", be introduced and marked Exhibit 78.

Commissioner Riley: So noted, Exhibit 78 of Respond-

ent.

Mr. Thelen: We ask that photograph No. 132, dated April 8, 1924, and marked "Pumps for use at Pier 4", be introduced and marked Respondent's Exhibit 79.

Commissioner Riley: Received and noted as Exhibit 79.

Mr. Thelen: We ask that photograph No. 216, dated July 16, 1924, and bearing the legend "Concrete piles for Pier 4", be introduced and marked Respondent's Exhibit No. 80.

Commissioner Riley: Received and noted as Exhibit 80.

Mr. Thelen: We next offer photograph No. 214, dated July 16, 1924, and bearing the legend "Diver at Pier 4", and ask that it be introduced and marked Respondent's Exhibit 81.

Commissioner Riley: All right, Exhibit 81.

Mr. Thelen: We ask that photograph No. 221, dated July 17, 1924, and bearing the legend "Driving concrete piles at Pier 4"," be introduced and marked Respondent's Exhibit 82.

Commissioner Riley: It will be received and noted as Exhibit 82.

[fol. 593] Mr. Thelen: We ask that photograph 235, dated July 26, 1924, and bearing the legend "Barge load of concrete piles for Pier 4", be introduced and marked Exhibit 83.

Commissioner Riley: So received, Exhibit 83.

Mr. Thelen: We ask that photograph 255, dated August 11, 1924, and bearing the legend "Driving concrete piles, Pier 4", be introduced and marked Exhibit 84.

Commissioner Riley: It will be received, so noted as Ex-

hibit 84.

Mr. Thelen: We ask that photograph No. 311, dated September 22, 1924, and bearing the legend "Hoisting concrete pile, Pier 4", be introduced and marked Respondent's Exhibit 85.

Commissioner Riley: So received and noted as Exhibit 85.

Q. Turning now to Pier 5, what is the next photograph that you suggest?

A. 141.

Mr. Theien: We ask that the photograph which is numbered 141 and dated April 22, 1924, and which has the legend "I-beam grillages for Pier 5", be introduced and marked Respondent's Exhibit 86.

Commissioner Riley: It will be received and noted as

Exhibit 86.

The Witness: View 141 shows some of the early structural steel which we specially purchased from the American Bridge Company, in this case for Pier 5. There were two sets, of structural steel units like this, one at each end of the Pier, for anchoring the eye bars which, in turn, higher up anchor the base of the structural steel bents to support the south anchor arm of the bridge.

Mr. Thelen: As I understand it, Mr. Derleth, this is [fol. 594] another instance of the structural steel which is not included in the cost of superstructure and which apparently is not included anywhere in Railroad Commis-

sion's Exhibit No. 3?

A. Apparently it has been entirely overlooked, as is the similar steel at Pier 1, for example. The next is 344.

Mr. Thelen: Next we ask that photograph No. 344, dated October 6, 1924, and bearing the legend "Excavating at Pier 5", be introduced in evidence and marked Respondent's Exhibit No. 87.

Commissioner Riley: It will be received as Exhibit 87.

Mr. Thelen: We next ask that photograph No. 470, dated December 26, 1924, and marked "Pier 5, looking west", be introduced and given Respondent's Exhibit No. 88.

Commissioner Riley: It will be received as Exhibit 88.

Mr. Thelen: We ask that photograph 483, dated January 8, 1925, and learing the legend "Realignment of Valona sewer to avoid Pier 6", be introduced and marked Respondent's Exhibit 89.

Commissioner Riley: Received and marked 89.

Mr. Thelen: We next ask that the photograph dated January 16, 1925, and bearing on it the legend "Removing cofferdam, Pier 5", be introduced and marked Respondent's Exhibit No. 90.

Commissioner Riley: Received as Exhibit No. 90.

Mr. Thelen: We next ask that photograph 506, dated January 31, 1925, and marked "Pier 5, looking west", be introduced and marked Respondent's Exhibit No. 91, I think it is.

Commissioner Riley: Yes, it will be received as Exhibit. 91.

[fol. 595] The Witness: In view No. 506 you see the completed Pier 5 with the structural steel protected by covers until such time as the superstructure is constructed. The pier is complete. You see surrounding it still some of the

remains of the construction platforms of the cofferdam, and in the distance the main line tracks of the Southern Pacific. This view is taken on January 31, 1925, and belongs to that set of numerous views which I had taken on the day the Duncanson & Harrellson Company quit and the Raymond Company and its two sub-contractors began the interim work.

Q. Bearing in mind the situation there as you actually knew it and bearing in mind also your very wide experience in other engineering projects, I will ask you whether it would have been possible, if starting on November 30, 1924, the money being available but nothing having been done before then, and no money having been expended up to that date, whether it would have been possible to have completed this Carquinez Bridge at the time when it ver actually completed and opened, which I understand was some time in May, 1927?

A. It would have been impossible, because you must first acquire your franchise, your permits, the approval from the California State Engineer, must make surveys and proceed as I have explained all through yesterday; must prepare plans and then call for bids. You would be working very

rapidly if you did that work in 18 months.

Q. Now, as I understand it, we were going through a number of photographs, which we had almost completed, referring to work done during what we may call the Duncanson & Harrellson period, and I believe you have still a [fol. 596] few photographs remaining relating particularly to Piers 6, 7 and 8?

A. Yes, sir.

Q. And what is the first of those photographs?

A. No. 83.

Mr. Thelen: We now ask that photograph No. 83, dated January 22, 1924, and entitled "Looking south along vialuct approach"; be introduced and marked Respondent's Exhibit No. 92, I think it is.

Commissioner Riley: It will be received and noted as

xhibit 92:

Mr. Thelen: Bearing in mind the swampy character of he ground shown on that photograph, would it have been ossible to move that pile driver in without some sort of testle work?

A. The only way to do the moving would be by trestle. The water was shallow at low tides and high ut high tides.

Mr. Thelen: We ask that photograph No. 484, dated January 8, 1925, and marked "Driving piles at Pier 6", be introduced as Respondent's Exhibit 93.

Commissioner Riley: So received and noted as Exhibit

93.

Mr. Thelen: We ask that No. 491, dated January 15, 1925, and marked "Pier 6-A-E" be introduced as Respondent's Exhibit No. 94.

Commissioner Riley: So received and noted as Exhibit

94.

Mr. Thelen: We ask that that photograph dated January 27, 1925, and marked "Pier 6", be introduced as Respondent's Exhibit No. 95.

Commissioner Riley: So received and noted, No. 95.

Mr. Thelen: We ask that photograph numbered 507, [for 597] dated January 31, 1925, and marked "Pile driver at Pier 7" be introduced and take Respondent's Exhibit No. 96.

Commissioner Riley: So received and noted as Exhibit

96.

Mr. Thelen: We ask that photograph No. 520, dated February 2, 1925, and marked "Pier 6-B-W" be introduced and marked Respondent's Exhibit No. 97.

Commissioner Riley: So received and noted.

Mr. Thelen: We ask that photograph No. 526, dated February 12, 1925, and marked "Taking jet soundings at Pier 8", be introduced and given the Exhibit No. 98.

Commissioner Riley: So received and noted as Exhibit.

98.

Mr. Thelen: We ask that photograph No. 540, which is dated March 3, 1925, and which bears the legend "Pile driver at Pier 7-B-W", be introduced as Respondent's Exhibit No. 99.

Commissioner Riley: So received and noted as Exhibit

Mr. Thelen: We offer that photograph dated March 11, 1925, and marked "Pier 8-A-E" and ask that it be given No. 100.

Commissioner Riley: So received and noted as Exhibit 100.

Mr. Thelen: We ask that that photograph dated March 19, 1925, and marked "Excavating at Pier 7", be introduced and take Respondent's No. 101.

Commissioner Riley: Received and noted as 101.

Mr. Thelen: We ask that photograph No. 558 which is dated April 21, 1925, and marked "Driving sheet piling Pier 8-A-E", be introduced and given Respondent's Exhibit No. 102.

Commissioner Riley: Received and noted as 102.

The Witness: I have selected this picture because of the shows the stage of the work at Pier 8 in the interim agreement, the Missouri Valley Bridge & Iron Company having [fol. 598] followed Duncanson & Harrellson on February 1, 1925, but a sub-contractor to the Raymond Concrete Pile Company. It is at this stage that the financing practically was signed and agreed.

Q. As I understand it, these people were not merely to interest themselves in the actual construction work but also to bring bond people into the picture who would finally supply the bond money for the completion of the project; that is the case, is it not?

A. The Raymond Company successfully acted in two capacities, that is, first as a general contractor, and they brought in successfully the two eventual contractors.

Q. And who were they?

A. They were the American Bridge Company, of the U.S. Steel Products Company, for the superstructure, and the Missouri Valley Bridge & Iron Company, of Leavenworth, Kansas. who were to complete the foundations. In the second place, and perhaps more important, they brought the successful bonding people, and in that sense they were part of the financial group.

Q. Do you happen to have the photograph that shows the men who were prominent at that time both in construction and financial work in connection with the bridge?

A. I have a photograph, No. 476, which I purposely took on January 6, 1925.

Mr. Thelen: We ask that that photograph, No. 476, and dated January 6, 1925, and which is marked "Left to right: Messrs. Duncanson, Everham, Upson, Derleth, Dent, Shurtleff, and Hanford", be introduced and marked Respondent's Exhibit 103.

[fol. 599] Commissioner Riley: So received and noted.

25-704

Q. Looking to the situation then in the latter part of April, 1925, approximately how much money had been expended by the American Toll Bridge Company up to that time?

A. On engineering and on actual construction they had spent just about \$1,000,000. That \$1,000,000 does not include overheads and cost of lands, legal expenses and all the other expenses incident to getting franchises and permits.

Q. As I understand it, it was only after the expenditure of that \$1,000,000 that the bond money became available?

A. That is certainly true.

Mr. Thelen: Will you now proceed with some further

comments on Pier 4 subsequent to April, 1925?

A. It must be apparent from what I have said yesterday and today that in the period from April 2, 1923, when we began explorations and actively proceeded to the McGill contracts and then in about September, 1923, with the Duncanson & Harrellson contracts, that it was my duty as the chief engineer, for obvious reasons, to build economically. So when it came to Pier 4, which is next in order of magnitude to Piers 2 and 3, I decided on the following scheme (indicating on blackboard).

I recall that that riprap which I placed does not seem to be mentioned at all in the Commission's Exhibit 3. It amounted to, in my rememberance—I made a few figures yesterday of the amount I placed—it amounted to about 4500 tons and it was very material there because later when the pier was finished it was to drop down into this soft material and replace the soft material as the currents washed the fine stuff away, and protect the pier.

[fol. 600] Q. Are you satisfied, then, as you look back at the situation now, that the amount spent on that pier was, under the circumstances, a reasonable amount?

A. It was an economical amount.

Q. Mr. Derieth, in view of the fact that there has been some challenge of the amount of money expended by the Company in connection with the temporary fender system. I wonder whether you have available, either some plans or photographs or both, which could visualize the temporary fender system so that the Commission and its experts might see what it actually was?

A. Yes.

Q. Mr. Derleth, you have had affixed to the blackboard two, shall we call them white prints, or what is the technical

A. These are white prints of the original tracings which

were submitted to the War Department.

Q. May we identify them in some way so that they may be marked as exhibits in this case?

A. Sheet 1 is entitled "American Toll Bridge Company, Fender System at Carquinez Bridge, rock embankment".

Mr. Thelen: I would ask that that white print be introduced as Respondent's Exhibit No. 104.

Commissioner Riley: It will be received and so noted as

104.

Mr. Thelen: And the other one, would you identify that

one, please?

A. Sheet 2 of the same series of drawings was submitted to the War Department, dated December 21, 1927. It is entitled "American Toll Bridge Company, Fender System at Carquinez Bridge and rock embankment."

Mr. Thelen: We ask that that print be received and [fol. 601] marked as Exhibit 105.

Commissioner Riley: That will be received as 105.

Q. Then, as I understand it, during the earlier days of the temporary fender construction you had what we may call a barge system, a system of barges, and then during the subsequent period we have a system of ships shown on Exhibit No. 105 with all the construction that is there shown between the four piers of Pier 3?

A. Yes, sir.

Q. Do I understand all of that construction was put in at the orders of the War Department?

A. It was put in by the orders of the War Department,

through numerous orders.

Commissioner Riley: When did this permanent fender, or when was the construction begun upon the permanent fender

in relation to the completion of the bridge?

A. The bridge was opened to traffic May 21, 1927, and the fender structure was accepted by us from the contractor, Healy-Tibbitts Company, about December 2, 1930. After that the War Department extended our operations to Followary, 1931, so that we could install all of the lights and fog

signals ordered by them and by the Light House Service of the United States.

Q. As I recall your testimony, the first permit that you had from the War Department called for a fender, did it not!

A. Yes, sir.

Mr. Thelen: May I ask you, Mr. Derleth, following the questions that have been asked by the Commissioner, as to whether or not it would have been possible to have constructed the permanent fender system while the piers were

in process of construction?

[fol. 602] A. No, sir, it would have been impossible because a permanent fender system, if built, could only be built after the piers were completed, and they were not completed until later in 1926, and then the fender system would have been in the way of the erection of the steel superstructure. Either you had to build the fender and then have the steel superstructure wait about 2 years, or you could build the steel superstructure first and then build the fender afterwards. And that was the position which the War Department considered rationally, so that we could open the bridge to traffic at an early date.

Q. All right, pardon my interruption. I believe you were about to get a few photographs which show the temporary

fender system.

A. Yes, No. 1280.

Mr. Thelen: We ask that photograph No. 1280, dated May 13, 1928, "Temporary center pier fender", be introduced and marked Respondent's Exhibit 106.

Commissioner Riley: It will be so received and marked as

Exhibit 106.

The Witness: Photograph 1280 shows four barges on one side, up-stream and down-stream, as ordered by the War Department January 17, 1927.

Mr. Thelen: Have you completed your comments on No. 1280?

A. The picture shows what I have already stated, that the War Department required four barges up-stream and four down-stream, with numerous cables and also cross-cables to act as a sort of barbed wire fence in case small craft came down against the piers.

Q. It also shows the temporary lighting system in connection with each of those barges does it not?

[fol. 603] A. Of course, all barges, whether they are for this purpose or for any other purpose, fixed in the stream during construction had to have lights on them in accordance with the laws of the United States.

Mr. Thelen: We ask that this photograph No. 1322, and bearing the legend "East ships 'Caroline' and 'Bangor', Pier 3 temporary fender system", dated June 15, 1927, be introduced and marked Exhibit 107 of Respondent.

Commissioner Riley: It will be received and noted as

107.

The Witness: The order of the War Department for these ships, dated May 24, 1927, instructed us to place the two up-stream ships first, and this picture shows the early stage of that placing. The next picture, 1326—

Mr. Thelen: We ask that that photograph which is dated June 24, 1927, and marked "Pier 3, temporary fender system, west ship 'Forester'", be introduced and given Exhibit

No. 108.

Commissioner Riley: It will be so noted, Exhibit 108.

Mr. Thelen: We now ask that photograph 1327, dated June 24, 1927, and marked "Pier 3, temporary fender system, west ships", be introduced and marked Exhibit 109.

Commissioner Riley: So received.

The Witness: This shows two west or down-stream ships practically harnessed, with four barges farther down-stream, protecting the ships from the extending anchor chains to the anchors. The next is No. 1338.

Mr. Thelen: We ask that this photograph No. 1338 and dated August 30, 1927, marked "Pier 3, temporary fender system", he introduced and marked Respondent's Exhibit 110.

Commissioner Riley: It will be received and so noted, 110. [fol. 604] The Witness: In this view we are noting two ships on one side of the pier and the early construction of those frames on the two south piers and the two north piers of Pier 3, with the stub pile system and the diagonal timbers such as you often see in ferry slips. The steel girders have not yet been placed as ordered. The next is 1348.

Mr. Thelen: We ask that the photograph numbered 1348 and dated September 13, 1927, and which is marked "Pier 3 fender system, placement of 30-ton steel struts between piers", be introduced and given Exhibit No. 111.

Commissioner Riley: So received as Exhit : 111.

Mr. Thelen: We ask now that photograph No. 1339, dated August 30, 1927, and marked "Pier 3, temporary fender system, view towards the north", be introduced and marked Bespondent's Exhibit 112.

Commissioner Riley: So received and marked 112.

The Witness: This view shows the four ships now in place but not fully corraled and chained. Those barges for the protection of ships against anchor chains have not yet been placed, but you see one of our derrick barges alongside the pier cluster, building those docks that were ordered.

Q. Now, just a closing question or two in connection with the temporary fender. I will ask you whether or not the moneys which the Company expended in connection with the temporary fender were necessarily expended?

A. They were ordered by the War Department. Besides

that, we wanted protection.

Q. As far as you know, were the amounts of money expended reasonable, bearing in mind the War Department's orders?

[fol. 605] A. We built and maintained those barges and ships and all accessories just as economically as we could. It was in our own interests to do so.

Q. Do you know of any reason why, in your judgment, an expenditure of that character should not be included in the rate base in a valuation case?

A. It is entirely a part of the cost of construction.

Q. Referring now for a few minutes to the permanent fender, I believe you have already testified that on June 29, 1927, the Company received from the War Department a letter stating the Department's requirements in connection with a permanent fender?

A. A letter of June 24, 1927, which listed the conditions of the permit and required us to prepare drawings and append them to a formal revised application for permit. That we did on July 16, 1927, and the permit was granted and signed September 20, 1927.

Q. The letter to which I referred a moment ago and dated June 29, 1927, is the letter, is it not?

A. Yes, sir.

Q. And I take it that you proceeded with the construction of a permanent fender under the War Department's orders!

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Those orders to which you have just referred by and by permit required first that, under the supern of the War Department, we should prepare the act plans, of which the two exhibits, 104 and 105, preliminaries. There were other plans which followed which were approved in January, 1928. And based use plans we proceeded at once to call for bids on the embankment in February, 1928, and we shortly there-called for bids on the concrete piling and concrete

And from those dates on the active construction of mbankment for the concrete fender proceeded and was 606] essentially completed in September, 1930, and, all the odds and ends, we accepted the Healy-Tibbitts

on December 2, 1930.

After that I take it the ships were removed?

The ships were not removed until the War Department us permission, and they issued that permit in Decem-1930, and at the same time they sent notice to navigate what dates the ships were to be removed.

Do you happen to remember the date on which the anent fender was formally accepted by the War Denent?

I have mentioned from memory that they finally acd the fender with the lighting in February, 1931. I give you the exact date, I think, if you want to take ime.

Was it February 12, 1931?

To the best of my remembrance it was about February I have that record somewhere.

I think that is sufficient without your taking the time into it further.

And here is my resume of all the orders of the War rtment on fenders, which were some 50 in number, ing in 1926 and earlier, running—February 12, 1931, War Department accepted the fender complete with ghts and navigation signals installed, and the Light e Service joined in the approval.

Have you just a few photographs dealing with work during the progress of the construction of the pernt fender?

Yes, sir.

Which is the first of those photographs? 1361.

Mr. Thelen: We ask that photograph No. 1361, dated November 23, 1928, and marked "Pier 3, fender riprap, m-[fol. 607] loading rock on 20-foot section north of 3.A piers", be introduced and marked as Respondent's Eshibit 113.

Commissioner Riley: It will be received as Exhibit 113.

Mr. Thelen: We ask that No. 1365, dated December 11, 1928, which is marked "Pier 3 fender, riprap, landing rock barge alongside of derrick barge", be introduced and marked Respondent's Exhibit 114.

Commissioner Biley: That will be received as 114.

Mr. Thelen: We ask that No. 1065, dated December 30, 1926, and entitled "3000-pound bronz fog bell for mounting on northeast corner Tower 3, cast by United Brass Foundry Company, S.F.", be introduced and marked Respondent's Exhibit 115.

Commissioner Riley: Received and so noted, Exhibit 115. The Witness: This bell was secured and specially approved by the Light House Service for the permanent installation of a fog bell on Pier 3 and, as the photograph states, that bell was installed in suitable housing on the north ast corner of the pier group.

Mr. Thelen: Were you able to find any item in Commission's Exhibit No. 3 for the installation of protection

against fog?

A. There is no evidence in the Commission Exhibit 3 for allowance for cost of fog bells or lights or anything that pertains to navigation, either on the fender or on floating equipment or construction, or on the floor of the permanent bridge or on the tops of the towers or the light beacons for aviation.

Mr. Thelen: We ask that that photograph dated May 22, 1929, and which has on it the legend "Pier 3, fender test [fol. 608] piles, driving south batter test pile. No. O Vulcan hammer", be received as Respondent's Exhibit 116.

Commissioner Riley: It will be received as Exhibit 116.

Mr. Thelen: Now, have you before you a copy of Railroad Commission's Exhibit No. 3?

A. Yes, sir.

Q. Will you please turn to Plate No. 2 on page 14. I will ask you whether or not that progress schedule shows the entire period during which work was being done, either preliminary to or in the actual construction of the bridge!

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Plate No. 2 of Commission's Exhibit No. 3, page 14, tes no activities on the part of the Company building side previous to April 2, 1923. I have already testihat we had costly and very active work beginning mber, 1922, on all fronts, preparing for franchise and t, making surveys in the Strait and on the adjacent rties, beginning to decide what properties we needed dition to those we owned, the making of current trements and so on—all a very necessary preliminary ril 2, 1923, when we authorized Duncanson & Harrell-begin the diamond drill borings.

State, please, whether or not that progress schedule work done by the Toll Bridge Company itself as guished from work done by its contractors or sub-

etors?

The diagram seems to be entirely silent on those ties which were under the immediate direction of the ser himself and his assistants, under the resident ser, for many different things that had to be done, which cost money and which were a necessary part

program of construction.

09] Q. On page 15 we find this statement, "In ating the cost of caissons a study has been made of tailed costs of caissons for the San Francisco-Oakland Bridge and the Martinez-Benecia Bridge". Have you

comment to make on that statement?

Well, such a study would be illuminating to anybody, ne conditions in 1923 to 1927 were entirely different. have repeatedly and tersely stated, we were a pioneer. long span bridges were built after the Carquinez e in different parts of the United States, new equipwas devised, power machinery became improved. I oned this morning that new types of long steel interg sheet piling were available, and so on and so forth. therefore, would be the cost of construction, or er you could build something in 1924 as you would it in 1934 is entirely an academic question. Prices, arse, changed, everybody knows that conditions were ent in the middle 20's than the early part of the 30's. conditions changed, new schemes of social arrange, made new costs in work where labor is involved. Will you please turn to Table No. 2 of the Commis-Exhibit 3, beginning on page 17? Now, before asking

few questions dealing with the individual piers, I

would like to ask you a more general question as to whether or not, in your judgment, the items shown in that table are sufficiently inclusive to cover the actual items in connection with the construction of the bridge?

A. They certainly are not. They represent a sort of brief preliminary view of what might be the cost of a bridge when you are not yet aware of all the hazards and

[fol. 610] all the difficulties that you will encounter.

Q. You might, if you will, mention some of the more

important items which apparently are omitted?

A. In order to be brief and also reasonably inclusive. I have made a careful analysis of the pages of Table No. 2 of Commission's Exhibit No. 3 and I think I might practically quote from one page of my notes: I'say, "I have already indirectly commented on estimates and particularly with reference to Piers 2, 3-A, 3-B and 4, and I have attempted to give reasons why estimates are low for these major piers if you omit important items such, for example, as the temporary fenders or amounts of riprap placed in these embankments. You must consider in unusual work the costs of anchorage systems, of temporary floating fenders, of launch ways, tugs and barges needed, derricks, the contributing cost to all of the foundation piers of the accessory buildings that were needed for tools or for engineers or for hospital or sleeping quarters; the construction wharves, the approach trestles over the Southern Pacific tracks, the changes in such trestles when the Southern Pacific Railroad changed its alignment and we were obliged to agree to such changes at our cost when we received an easement in August of 1924." The cost of all such items is material. And in these pioneer days and for, say, smaller structures than the Bay Bridge, the head charges may become a very high percentage and unless you consider them specially and in the light of their own case you may either over-rate or under-rate them. In this case I think they were usually under-rated, and very largely because some of these items were not apparent to the engineer who prepared these estimates in the Commission's [fol. 611] Exhibit 3. Then there are throughout the estimate for all the piers and the foundation work—there seems to be an under-rating or an entire omission of the costs for material and labor for false work. I have referred to the necessary false work around Pier 4 to reach Piers 6, 7 and 8, or Pier 5 in the water; and apparently such overhead charges

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Q. items for exthing.

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pensation insurance, contractor's profit, surety bond the removing later of false work structures, cleaning site, various contingencies and hazards which should sidered, the submarine cables and the power lines, stallation of power and pumps and fuel, all of which flected in costs; also the general insurance on the eter's plant and, certainly, a reasonable amount of to which he is entitled. All such items are either d or forgotten or misunderstood, or it is claimed they in unit prices which cover all of these uncertainties. Vould that he a normal way for an engineer to handle of that character, to put them, say, in a unit price avation or unit price for reinforcing steel or some of that sort?

for an unprecedented pioneering structure of great rude, in a position of hazard, the only way to make estimate is to consider every important part in its ght and then add those costs. Considering each item is you can then for that particular item consider rticular unit price and you will get that way, if we competent and experienced both as an engineer contractor, you will perhaps get a reasonable price total work. But even then, experienced as you entractors often under-bid and sometimes they bid [2] so high they never get the work. But the only particularly in a case like this, is not to make an inc paper bid based on comparisons but to consider item and then, with the best knowledge at your comassign prices to each item.

Vell, without going into further details as to Pier 1, it from what you have stated there must have been ant omissions to have resulted in an estimate as low

00 for the construction of that pier?

the overhead of that equipment is associated to 1100 ards. You have to bring the equipment in and you take it out again. If this pier had had a million in it that overhead becomes a very modest pertial is for such reasons that I stated in a general

rlier that it is extremely dangerous to say that in ait prices you are putting overhead. I notice that

frequently, whether the pier is a \$10,000 pier or whether it is \$110,000 or \$1,000,000, the same unit prices are frequently used for the same object or similar objects.

Q. This Pier No. 1, I believe you have already testified, was located over on the Solano County shore in a mure

or less inaccessible place!

A. Decidedly inaccessible at that time.

Q. If you will kindly return to Table No. 2 on page 13, to you have any comments to make with reference to Piers [fol. 613] 2, 3-A and 3-B? The page should be 17, I see.

A. Well, there again in that estimate there are, as I see them, four items and four unit prices; but I see no evidence there of the inclusion in those items, or properly included in those items, the cost of pumping, the pumping equipment on the floating barge, the jet systems, the piping for the jet systems, the operation, cost of operating water jets, the cutting edges, the preservative paint on exposed timbers outside and on the inside of the dredging wells, the large cost of the anchorage systems and their maintenance, which were in several stages, as I have testified; first barges, . then ships, then chips moved; no item for divers, and so forth. Of course, I am aware it has been here testified by Mr. Mitchell that he thinks those are all included in the unit prices. I know his estimate for Piers 2 and 3 is much lower than what we paid out and, as a matter of fact, I know we felt at the time we were building the piers very economically.

Q. Turning now to Pier 4 on page 18, have you any comments to make on the cofferdam items or other it was

which are shown in connection with that pier?

A. Well, if you look on page 18 you will see the items listed. The author, Mr. Mitchell, assumes he would start and drive some sheet piles and then put a reasonable amount of what he calls "waling" and proceed at the unit prices indicated here. But I have attempted to show yesterday and today, particularly this morning, that that pier is in an unusual position and we either have to use a cofferdam and very soft ground, or you have to go to a much more expensive type, the dredging type. I decided to use the cofferdam box heavily braced, much more heavily than Mr. [fol. 614] Mitchell seems to consider necessary, and I surrounded it with sheet piling. He says nothing in his estimate regarding the necessity, either then or in future, for riprap embankment around that pier, the scour wash

of the soft materials, as they naturally would—and you must remember there was no pier head line here at the time we asked the War Department to establish it. And there is nothing in this estimate, except if it occurs in overheads of his unit prices, which I doubt very decidedly, for such things as the construction platforms, particularly those that I repeated pointed out in the photographs on the north side; the dolphins. And I have attempted to show, particularly this morning, that whatever you use, whether you use my cofferdam box or whether you use sheet piling specially designed from a different angle, and more hindsight, and framing inside of that, that framing had to be built also for the purpose of carrying the heavy pile drivers and these heavy concrete piles. So, summing up—and I am in a way repeating what I have said for piers 1, 2 and 3—there are many things omitted—riprap, pile dolphins, construction platforms and bracing, divers, cleaning of the bottom, the digging of the bottom deeper than he assumes-you have to allow for swelling of the ground in driving piles—and the rock ballast at the bottom of the pier, which he has not included, and so on and so forth. At any rate, he gets a price, according to his methods, of \$237,230 for that pier. And I certainly was trying my best to build an economical pier, and I spent \$428,910.

Q. This is a small item, but what would you say as to an expense of \$400 for unwatering and pumping? [fol. 615] A. Well, there must be some error there. That

figure—well, to be frank, that figure is ridiculously small.
We had two 10-inch pumps and one 8-inch pump in the cofferdam.

Q. During what period of time were those pumps operated?

A. Two or three months.

Q. You had to run the pumps for that length of time?

A. Yes.

Q. And did you rent the pumps or did you buy them?

A. Well, at first they started to rent pumps but I think we finally, on the rental agreement, found it would be cheaper to buy them.

Q. Those pumps required fuel oil to operate them?

A. One was a gasoline pump and the other two were operated by motors.

Q. How about wages in connection with the operation of the pumps! How many hours a day did the men watch the pumps and operate them?

A. During the work on the lower reaches of the foundations, say around minus 40, we had pumps operating all day

long, three shifts.

Q. Three shifts of 8 hours?

A. Yes.

- Q. Then it is your judgment, I take it, that there must be some very serious mistake in connection with that estimate?
  - A. Well, the \$400 item, there is something wrong about it.

Q. Now, shall we harry on to Pier 5 on page 18? Have you

any comments on that pier?

- A. Well, Pier 5, again, is to be similarly discussed. I have pointed out that that pier was out in open water at the time it was built. The photographs show it. We had to build pile trestles, we had to build a cofferdam, we had to excavate as is here indicated, 400 cubic yards—I have for [fol. 616] gotten at this writing how many yards we did excavate but it can be found in our records. We built the sheet pile cofferdam and we put in rock ballast under the concrete, we put construction wharves here, we changed the Valona se wer outlet after it passed this uph a culvert of the new main line track connection of the Southern Pacific, and so on and so forth. Again I will repeat that the other things like compensation insurance, bonding and a host of items which are all claimed to be in these unit prices, and then there are a lot of items omitted.
- Q. Are you able, for instance, to find any reference here to the cofferdam?

A. No, none whatever:

Q. Construction of the pile platforms?

A. None.

Q. Moving the Valona main outlet sewer?

A. No.

Q. Demolishing the old Six Minute Ferry Company's auto trestle which ran over the site?

A. No, sir.

Q. Do you have any comments on Piers 6, 7 and 8 referred

to on page 19 of that Exhibit 3?

A. I have repeatedly in my testimony referred to this area as a swamp. The figures show it clearly. Yet this estimate, which is very low, about half what it ought to be,

apparently assumes there piers were built on dry land, that we just dug out a little area and we built these pedestals, four in number, for each of the piers, 12 pedestals, built them right on dry land. Now, I have shown, and I am repeating what I have said, that we had to build extensive trestles and platforms, had to carry all the equipment out there on these trestles, we had to drive the piles, we had to pump, had to build cofferdams, and so on and so forth. And none of these items that I am more or less emphasizing appear in the estimate.

Q. Assuming just for the sake of the argument that it were [fol. 617] intended to throw the 12 cofferdams into the price of concrete at \$14 per cubic yard, and assuming those 12 cofferdams cost between \$10,000 and \$15,000, what would you say with reference to the adequacy of the \$14 per cubic yard of concrete to take care of the cofferdams in addition to all the items which normally would get into the cost of concrete?

A. You have answered that question yourself; there would be nothing left for concrete and nothing for workmen's compensation and for contractor's profit and the host of other items I have been repeating over and over again.

Q. May I ask you—and this is a personal question—as to whether you, in any of your estimates throughout the long practice of your profession, have been accustomed to throw cofferdams into the price of concrete.

A. No, I do not, because sites vary, conditions vary and times vary and what is a cofferdam at one place is a very different cofferdam at another place. I have already implied over and over again that it is one thing to build an enclosure for 10,000 yards and another to build an enclosure for ten times that amount on one-tenth of that amount; and you are in a dangerous position when you try to put a percentage into unit prices for those extremely varying conditions.

Q. Would you kindly look at the foot note at the bottom of page 19 of that exhibit. I find there a statement that "Considerable work was done on force account without definite plans".

A. Mr, Mitchell must have been misinformed about that. I certainly have indicated that our plans never strictly deviated from the permanent plans as early as April 17, 1923, and our contract plans were signed by Steinman and myself in November and December, 1923.

[fol. 618] Q. A little higher on the page I find, Mr. Derleth, an allowance of 5 per cent for extra work and change

in plans. Would you kindly state from your experience whether an allowance of 5 per cent is adequate for those items?

A. In the first place, such an item ought to include other things besides extra work and changes in plans, which are contained in contingencies and contractor's profit and elements of hazard which are contingencies, and so forth and so on. 10 per cent is very modest and 15 per cent would be much safer, and then it must be based on a real total cost and a real pier and not upon a paper estimate.

Q. Now, I will ask you if you will be good enough, Mr. Derleth, to turn to page 21 of the report. On page 21 under the head of "Miscellaneous construction work" you will find the elimination of an item of \$11,460 expended by the Company for the Miller and McKinney houses and for comfort station and Inn; have you any comment with reference to those items?

A. Well, they are phenomenally modest, very economical, include not merely the houses but they include the whole arrangement on our tell plaza, its drainage, sewer system, and so forth.

Q. Have you any recollection, Mr. Derleth, of the amounts that were expended for toll plaza by the San Francisco

Oakland Bay Bridge or the Golden Gate Bridge?

A. Yes. I was officially connected with those enterprises. Those are very monumental structures. The other night I looked for the early figures. The toll plaza of the Golden Gate Bridge, with all of its appartenances, structural appartenances, exceeded \$578,000, and for the Bay Bridge the costs exceeded \$360,857.

[fol. 619] Q. Would you be sympathetic, then, as to eliminating a small item of \$11,000 as to the Carquinez Bridge, which covers not merely the toll plaza there but also the

Miller and McKinney houses?

A. I think it would be very unjust.

Q. I am going to ask you a few questions on the subject of the cost of the permanent fender. If you will kindly handle that matter in your own way, bearing in mind we are interested, first, in the actual quantity of the riprap and secondly, in what would the reasonable price to pay for it. Will you kindly develop it in your own way?

A. Well, I notice that Mr. Mitchell, author of the estimates in Commission's Exhibit 3, states he saw somewhere in the directors' reports at one time that they had accumulated

150,000 tons of riprap in the embankment. My records would show that we placed 163,000 tons, and that is in excess of the \$1,474 tons of riprap placed at Pier 3 on the War Department's order of July 1, 1926, to fill up the scour places. That is the amount of riprap we scraped down through pipes, 163,000 tons—that is, at that time when the fender was built.

The best price that you could get normally in San Francisco at that time in 1928 from any responsible quarry was \$1 a ton at the quarry and 20 cents to tow it to the site. That made \$1.20 per ton. To this I am willing to accept the 45 cents for placing that Mr. Mitchell used, which makes \$1.65 per ton in place for the riprap of the embankment, provided he will also include the costs of our equipment which we used for the placing. Now, if you will multiply 163,000 tons by \$1.65 you get a total cost for the riprap in [fol. 620] place of \$268,950, plus the use of our equipment which you saw in the photograph.

Mr. Thelen: Now, Mr. Derleth, you have been on the stand a long time and you must be quite tired. I am going to ask you only as to one other item. You have noted in the recapitulation on page 27 that the Commission's estimate cuts the item for engineering expense from \$390,076 to \$304,320. I will ask you whether, in your judgment, that is

A. I think it is very unjust; and, of course, I mean by that that the person who assigns that reduction is misinformed. I know what engineering costs are on structures for the last to years, and we were very economical and, may I say, efficient. We had no money to waste in the engineering department and that item includes all of our endeavors from September, 1922, on. And when it is all said and done I think you will find that the total figure is 6 per cent of our construction costs. 6 per cent of our bridge construction costs is very modest, if I have made any impression here as to the problems we faced and the problems we successfully met.

## Cross-examination:

Mr. Rowell: I have just a few question for information and I presume Mr. Derleth will be available at some future time if, after consultation with the engineers, further cross-cramination is desired.

Mr. Thelen: Oh, there is no question about that, certainly.

26-704

Mr. Rowell: First of all, in respect to the arrangement made with the Raymond Concrete Pile Company, was that [fol. 621] evidenced by written contract in the first instance!

A. You mean in January, 1925?

Q. When you first began negotiations, or some time som after, with the Raymond Concrete Pile Company and they undertook to come in and do some work.

A. I can say definitely that there was a written agreement as to the interim work which was to be done.

Q. That was on a cost plus basis, was it?

A. It was on a cost plus, as I remember.

Q. I understood you to say earlier in your testimony today that they were to continue without delay to do the work that was presently being pressed forward by Duncanson & Harrellson?

A. Yes, sir. The Raymond Company was to continue until the whole bridge was completed, and they were to continue in the capacity of a general contractor with two major subcontractors, one for superstructure steel, the American Bridge Company, and the other, the Missouri Valley Bridge & Iron Company, for sub-structure. And perhaps I am saying more than you expected—in January the intent, I think, was—in fact, I am sure of it—that whatever work was done between February 1, 1925, and the day in April, 1925, when the financing would be completed, would be reflected in the bids for guaranteed completion. But, you see, on April 10, 1925, the Raymond Company went out of the picture.

Q. You say that that work would be reflected in the bids; was it not contemplated that there would be one bid, that of

the Raymond Company?

A. That is true, in January; but, you see, the Raymond Company passed out of the picture on, I think, April 10, [fol. 622] 1925, so all the work that was done by the Raymond people and their two sub-contractors between December, 1924, and April 10, 1925, is that \$110,000, part of which was a claim as I have tried to explain this morning. That money was paid to the respective parties, the Missouri Valley people getting nearly \$60,000, and then the contracts for completion of the Missouri Valley and the American Bridge are the contracts which are recorded and which Mr. Mitchell lists in Exhibit 3.

Q. After the Raymond Company stepped out of the pic-

A We readjusted and revised the contracts and the costs, lump sum costs, that were to be guaranteed. I was present at all of those negotiations.

Q. You spoke of the settlement of a claim presented by

the Raymond Concrete Pile Company?

A. Yes, sir.

Q. Now, didn't they actually bring suit against the Toll

Bridge Company?

A. The Raymond Company after April 10th, when they said they were ready to go on but did not want to take any risks of penalty if extensions of time were not granted. that any such penalty should be borne by the American Toll Bridge Company-I think I said this morning that the two sub-contractors were willing to take that risk. What it amounted to was this, there was no doubt that an extension of time would be willingly granted by the Contra-Costa Supervisors, but the lawyers said, "You must get corroboration from the State Legislature". That is as I remember it. And the Raymond people said, "We won't have anything to do with it". And Mr. Aven Hanford, the [fol. 623] president of the Bridge Company, and Maxwell Upson, president of the Raymond Company, I think, got a little tiffed on the subject. But the Raymond people said, "We are willing to go through with this problem; we were not to guarantee extensions of time, that is not our business: and had we gone on with this work we would have made a certain amount of profit. We have furnished you with successful sub-contractors, we have furnished you with successful bonding houses, we have arranged with you through our engineering services between December, 1924, and April, 1925, to get all of these arrangements, technical and otherwise, settled; therefore, we have been your engineers and we have been your financial agents and we are entitled to a certain portion of that profit in addition to the payment for our actual expenses. And if you don't pay we will sue you." Hanford apparently finally said, "Well, for your services we will give you \$50,000, plus \$1200 for certain office expenses and the rest of the \$110,000 you must agree to pay to the Missouri Valley Bridge & Iron Company, who have shown us that that balance of something like \$60,000 is due them for the actual work that they did on Piers 3, 6, 7 and 8," as I have already described and, of course, on other things, on the docks and so on.

Q. Will you kindly refer, Doctor, to page 13 of Exhibit 3 which lists all of the contract payments, presumably!

Q. I want to ask you as to these figures on page 13, whether or not all of them down to the contract of May 11, 1925, as listed in the lefthand column, with the United States Steel Products Company, could not all be assigned to the.

[fol. 624] sub-structure of the piers?

A. A considerable quantity, yes. Let me take the number in order. Of course, the Thomas C. McGill is not foundations, most of that was that railway cut, I will call it, and roadway north of Pier 1. Then the next item was excavation, the rough excavation at Pier 1. That would be included in foundations. Later on Duncanson & Harrellson completed Pier 1. Those costs apparently are in the next item, \$655,580, and that item includes all the work—what Duncanson & Harrellson did on Pier 4, it includes what they did on Piers 2 and 3 and on Pier 5 and what he did for the trestles in the railroad swamp, what pile driving and other work he did at Pier 6. It includes all the work at Piers 9, 10, 11 and 12 which were completed with the exception of the work on Pier 12 that—

Q. As illustrated by nearly all the photographs intro-

duced?

A. Yes. And, of course, it includes also the work Duncanson & Harrellson did in either demolishing trestles at Pier 5; in building new trestles, as I have illustrated and explained by the photographs, and then there is all that construction wharf that I explained.

Q. May I interrupt you there? Does this represent all

that was paid to Duncanson & Harrellson?

A. Well, so far as I know, yes. I don't know.

Q. Now, looking at your progress photographs that you have introduced in evidence, all of your wharves, preliminary structures and your cofferdams, was anyone, other than Duncanson & Harrellson, interested in that construction and paid any sum of money?

A. I can't answer that question; I don't know.

[fol. 625] · Q. You spoke several times this morning as "we". I take that to be the Company itself engaging in some construction work. Now, I wish you would explain that for me.

Q. Well, what I meant by that, of course, comes solely from myself. I know that throughout emergency conditions

after the Duncanson & Harrellson Company went out of the picture physically on February 1, 1925, Mr. Calder and I were the engineers in charge of those operations, and if we needed to do something that was not in the Missouri Valley contract or in the American Bridge Company's contract and there were many such things vhy we did them, and those were charged to the American Toll Bridge Company. That is what I meant by "we". For example, even after the bridge was open to traffic, I have explained Healy and Daniels furnished rock at a certain price for the embankment. We, the American Toll Bridge Company, furnished equipment and an engineering force and even laborers to assist in the placing of that rock. The American Toll Bridge Company placed those temporary fenders, those eight barges and then the ships. Now, that kind of bookkeeping they finally used after I gave them the costs I don't know.

Q. Well, I would like to confine the discussion to the period up to about the 1rst of 1925 when Duncanson &

Harrellson ceased operation.

A. Yes.

Q. Now, do you know whether or not all of the labor, or practically all the labor and material was furnished by Duncanson & Harrellson?

A. Essentially all, yes, as far as I know, except the labor

of the engineers.

[fol. 626] BEN C. GERWICK, a witness called on behalf of the American Toll Bridge Company, being first duly sworn, testified as follows:

'Direct examination:

Mr. Thelen: Where do you live, Mr. Gerwick?

A. I live in Berkeley.

Q. And what is your business or occupation at the present time?

A. I am president of Ben C. Gerwick, Inc., and also chief engineer of the American Toll Bridge Company.

Q. Where is the office of Ben C. Gerwick, Inc.?

A. 112 Market Street, San Francisco.

Q. In what business is the Ben C. Gerwick, Inc., engaged?

A. Engaged in the general contracting business.

Q. Does the Company specialize in any particular type of contract work?

- A. Yes, it specializes in wharves, piers, cofferdams, caissons and in under-water construction, heavy construction.
- Q. How long has the Company been engaged in that type of work?
  - A. Since February, 1926.
- Q. You have been the president of the Company throughout all of that time?
  - A. I have.
- Q. You referred to being chief engineer of the American Toll Bridge Company. How long have you served the Company in that capacity?
  - A. Since February, 1936.
- Q. Now, Mr. Gerwick, I will be very much obliged to you if you will tell us something about your education, training and experience. You might begin with your education. I imagine you are a graduate of some college or institution, are you?
  - A. I am a graduate of Ohio State University.

Q. Suppose you pick up your story from there and tell us what your training and experience has been subsequent to [fol. 627] that time? You graduated in 1906, did you not?

A. I graduated from Ohio State University in 1906 and I have the degree of civil engineer from Ohio State University. I have been an associate or corporate member of the American Society of Civil Engineers since 1912. I am a licensed civil engineer of the State of California, No. 478. I previously testified that I am present of Ben C. Gerwick, Inc., and that my company specializes on construction of wharves, piers, bridge foundations, caissons, cofferdams and deep water foundations. I am the inventor and owner of U. S. Letters Patent No. 1624330 for the construction of deep water cofferdams and open caissons. The patent has been used in constructing two major piers in San Francisco Bay.

Q. Now, we would be very much interested if you would tell us something of the projects with which you have been connected as engineer or contractor or in any other capacity.

A. Well, from 1906 until the present time, the period of 31 years, I have been continuously engaged in the construction of wharves, piers, approach foundations and cofferdams, as resident engineer, superintendent of construction, contractor's engineer or contractor.

Q. Well, would it be convenient to take up the matter more or less in chronological order as far as the different jobs with which you have been connected are concerned?

A. Yes. I was, starting in 1906, resident engineer on several bridges of the Western Pacific Railway Company in the Feather River Canyon, the Willow Creek viaduct, bridge A, B, C, D, E and F. Later in that period I designed three bridges in Ohio, one known as the Dresden Suspension [fol. 628] Bridge and one known as the Roseville Arch Bridge. I was resident engineer in California on the Black Point cut-off bridge, the Yolo Causeway-I think those two. From that I was the contractor's engineer on the King City Bridge, Oroville Bridge-those are the two. I was general contractor on the San Ardo Bridge, the Moss Landing Bridge and the Montezuma draw-bridge. I was resident engineer on the railroad bridge for the O. R. & N. Railroad at Bonneville, Oregon. I was contractor's engineer, chief engineer, for the under-pinning of the masonry piers of the draw-bridge across the Sacramento River at Colusa, without putting the draw span out of operation. As general contractor I replaced the center pier and shifted the Montezuma draw-bridge horizontally 30 feet without interrupting traffic.

Q. Where was that?

A. Across Montezuma Slough in Solano County. As superintending engineer or contractor I have built a great many piers and wharves on San Francisco Bay.

Q. That work, I imagine, came a little later?

A. Came later, yes.

Q. You first testified to your earlier work which was largely bridge construction?

A. That is right.

Q. Now, with the advance of years you became interested in the construction of piers and wharves on San Francisco Bay, did you?

A. Yes.

Q. Will you kindly give some of the jobs of that type with which you have been connected on San Francisco Bay?

A. I could presumably name a great many but I would like to say the Standard Oil Company at Richmond, Union Oil [fol. 629] Company-

Q. May I ask in connection with each of these that you kindly specify how you were connected, that is, in what ca-

pacity you were connected with the job?

A. With the Standard Oil Company at Richmond I was chief engineer for the contractor—you might call it superintending engineer. The Union Oil Company at Oleum. chief engineer for the contractor and also later general contractor. For the Port of Oakland, a general contractor. For the Parr Terminal Company, Oakland, general contractor. For the Port of San Francisco, Board of State Harbor Commissioners, San Francisco, I was the contractor's engineer on a great many structures and I also have been a general contractor. On some of the wharves for the Union Iron Works at Alameda and at San Francisco I was both contractor's engineer and on later structures I have been the general contractor: And for the United States Government, San Francisco Bay, I have been the contractor's engineer on quite a few of the wharves and I have been general contractor on quite a few. At Los Angeles Harbor I built the light house wharf on Terminal Island, general contractor. I also built ferry slips and aprons for the Santa Fe and the Sacramento Northern Railway Company.

Q. Have you had any experience in the construction of,

cofferdams?

A. Yes, I have.

Q. Please state what that has been.

A. As a general contractor I designed and built three deep cofferdams for the foundation of the Third Street bridge in San Francisco. I designed and acted as consulting construction engineer for another contractor on the two large cofferdams for the Park Street Bridge across the Oakland [fol. 630] estuary. Those were the two cofferdams mentioned by Dean Derleth and were probably as large as any ever built, with that head of water, without a seal. I designed and was superintendent of construction on 36 cofferdams in Dumbarton Strait for the piers of the Hetch Hetchy pipe line crossing.

Q. About what year was that?

A. That was during 1924 and 1925.

Q. That was during the period during which the Carquinez Bridge was under construction, part of that period!

A. Yes, that is true.

Q. Did you do other work in connection with the Dumbarton Strait?

A. I designed and superintended construction of the large caisson in the center of the Dumbarton Strait where the Hetch Hetchy pipe lines go under the channel in the Dum-

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tor refe on Strait, and I think it was probably the largest open cofferdam ever attempted up to that time.

. Do you remember what the size of it was!

. It was, as I recall it, circular, 84 feet in diameter, and unwatered to a head of about 60 feet. The outside shell t, of cylinders, went to a depth of 84 feet below low er.

When was that work done?
That work was done in 1924 and 1925 and I think it either completed in the late Fall of 1925 or perhaps uary, 1926.

. In what capacity were you connected with that work? . I designed the cofferdam and superintended the actual struction of it. I designed and superintended the conction of ten cofferdams, or they are an open crib, as we them, for the piers of the Dumbarton Highway bridge ss the Dumbarton Straits.

. 631] Q. When was that work done?

The major part of that was done in 1925 and possibly e of it in late 1924. I superintended the construction the sinking of 40 concrete caissons at the China Basin inal in San Francisco.

What sort of work was that?

. They were concrete caissons for the sea wall which from Third Street Bridge to Pier 46. These caissons, it 50 feet long, were made on land on launching ways launched, towed into the site, up-ended and sunk. Of se, they were too heavy to lift and we moved them and them by the use of water, controlled by valves. I deed and was superintendent of construction on the cofam for the pumping plant of the California Water vice Company at Pittsburg. I was construction conant for the contractor on the Golden Gate Bridge anages, the south anchorage going 45 feet below sea level, n low low water, or 60 feet below the top of the sea at Fort Point. Of course, it was exposed to the open. and quite a problem. I have been superintendent of truction on many ship ways and marine railways at various ship yards on San Francisco Bay and have en many deep steel cylinders on various projects.

Have you done any work since 1935, either as contracor engineer, work of the type to which you have been

rring?

A. I have been engaged in such work all the time. At the present time I am completing, or my firm is, completing Pier 19 for the Board of Harbor Commissioners of San Francisco.

[fol. 632] Q. Now, have you at my request prepared a portion of an estimate of the cost, of the reasonable historic cost, of the Carquinez Bridge?

A. Yes, I have.

Q. I understand that you prepared the larger portion of that estimate and that Mr. Ready then completed the estimate in certain respects; is that correct?

A. That is correct.

Mr. Thelen: If your Honor please, I would like to offer in evidence an exhibit entitled "Reasonable historical cost, Carquinez Bridge American Toll Bridge Company," and ask that it take the next exhibit number.

Commissioner Riley: 117. So received and noted.

(Here follows Exhibit No. 117-pages 26, 27, 29, 30.)

[fol. 633]

COMPANY EXHIBIT No. 117

Witness- Gerwick and Ready

Reasonable Historical Cost, Carquinez Bridge, American Toll Bridge Company

Cases Nos. 4244 & 4259

San Francisco, December -, 1937.

[fal. 634]

Carquines Bridge

## Recapitulation of Construction Cost

				Historical Cost
(1)	Pier	and Foundationa:		
		Exploration of foundations		\$43,286.00
3	b.	Pier No. 1	\$12,643.00	*20,200
	. C.		626,838.26	
	d.	Pier No. 4	422,325.90	
	0.	Pier No. 5	35,729.00	, , , ,
. 1	I.	Piers Nos. 6, 7 & 8	55,142.00	
		Piers Nos. 9, 10 & 11	4,481.00	
	F.	Pier No. 12.	3,707.00	
	1.	Pier No. 12	,	
		wharf or treatles	84,390.00	
	10	Overhead	113,328.00	
		Total (b to j, incl.)		2,358,584.16
	1.	Riprap, Piers Nos. 2 & 3		39,362:00
		Total (a to l, incl.)		2,441,232.16

# COMPANY EXHIBIT No. 117-Continued

Carquines Bridge Recapitulation of Construction Cost—Continued

	*			Reasonable Historical Cost	
68	Superstructure	Miscellaneous.		2,822,499.00 625,103.00	
(5)	General and Miscellaneous:  a. Approach work and co b. Toll house building. c. Other buildings. d. Spectal equipment for the control of the c	*********		35,312.00 -17,093.00 -11,461.00 -24,307.00 -66,835.00 -19,668.00	
(7)	Total of Items (1) to (6), In	clusive.,		6,061,520.16	1
(8)	Engineering and Inspection General Overhead Expenses Preliminary Expenses Organisation		5%	365,644.68 508,176.00 212,223.00 148,824.00	
(11)	Total of Items (1) to (10), 1	Inclusive		7,093,387.84	
(12)	Interest During Construction	m	14.745%	1,045,920.00	
(13)	Grand Total			\$8,139,307.84	
loL.	635[	Original Cost		Ressonable	
(1)	Piers and Foundations (Total)	Recorded Amt. \$2,305,079.04		#13. Histor. Cost	
88	Superstructure. Existing Fender System &	1		2,822,499.00	
	Miscell General and Miscellaneous: a. Approach Work and		625,102.79	. 0	
	b. Toll house building c. Other buildings d. Special equipment for	35,322.30 17,092.77 11,460.76	17,092.77	17,093.00	*
	toll house, bridge, etc. Lands. Furniture and Fixtures	24,306.93 66,834.62 19,668.23	66,834.62	66,835.00	
E	Total of Items (1) to (6), Incl	5,927,366.31	5,927,366.31	6,063,520.16	
	Engineering and Inspection (actual)	. 365,644.68	365,644.68 492,142.77	365,644.68 303,176.00	
(10)	General Overhead Expenses Preliminary Expense— Organisation	327,883.91 148,823.79	327.883.91	212,223.00	
Va.	Total of Items (1) to (10), Incl	7,261,861.46	7,261,861.46	7,093,387.84	
(12)	Interest During Construction	688,092.56	1,070,761.00	1,045,920.00	
(13)	Grand Total	\$7,949,954.02	\$8,332,622.46	\$8,139,307.84	
5 65					

	Continued
[fol. 636] Carquines Bridge	
Property as of August 31,	1987
Furniture & Equipment:	
As per Mr. Mitchell's Exh. 16, page 10-	
80.762% of \$24,353.32	\$19,068.m
Lands & Right of Way (Reported Actual Investment (Parcel Numbers as per Carquines Bridge Di	awing C-23)
Fee Lands	\$53,753.17
Parcel 7 Bet. Piers 4 and 5	\$2,500.00 1,950.00
" VIII Crockett Land & Cattle	9,836.17
* X Miller House	. 15.717.00
Parcel I Clyne Tract (55A)	8,000.00
Parcel I Clyne Tract (55A)	750.00
Right of V. W.	12,000.00
Civiletti Tract	4,250.00
" XVII Dos Rios	8.700.00
Miscellaneous	
Solano County	55:00
Total Bridge Lands & Rights of Way	
Solano County	7,623.59
Tot. Including Tidelands	\$74,458.21
Hol. 637) - Analysis of Cost of Carquine	Bridge
Total as of August 31, 1	937
Contract Items:	
Thos. C. McGill—Approach to Pier No. 1  Excavation Pier No. 1	\$10,201.60
Duncanson & Harrellson	1,094.32 763,908.14
Exploration & Pier Foundations	55.580.36
	108,327.78
Concrete Floor.	. 11A 692 52
Concrete Floor	s
Concrete Floor.  Raymond Concrete Pile Co.—Pier Foundation Blake Bros.—Aggregate.  Daniels Contracting Co.—Aggregate.	33,639.49
Concrete Floor  Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate  Daniels Contracting Co.—Aggregate  Missouri Valley Bridge & Iron Co.—Pier Foundation	33,639.49 edations 1,417,660.15
Concrete Floor  Raymond Concrete Pile Co.—Pier Foundation Blake Bros.—Aggregate  Daniels Contracting Co.—Aggregate  Missouri Valley Bridge & Iron Co.—Pier Foun U. S. Steel Products Co.—Steel Superstructure Heady-Tibbits Co.—Rigrap	33,639.49 adations 1,417,660.15 2,686,854.47 39,361.92
Concrete Floor  Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate.  Daniels Contracting Co.—Aggregate.  Missouri Valley Bridge & Iron Co.—Pier Four U. S. Steel Products Co.—Steel Superstructure Healy-Tibbits Co.—Riprap.	33,639.49 edations 1,417,660.15 2,686,854.47
Concrete Floor  Raymond Concrete Pile Co.—Pier Foundation Blake Bros.—Aggregate  Daniels Contracting Co.—Aggregate  Missouri Valley Bridge & Iron Co.—Pier Foun U. S. Steel Products Co.—Steel Superstructure Heady-Tibbits Co.—Rigrap	7 19.20 33, 539.49 1,417,660.15 2,686,854.47 39,361.92 27,316.62
Concrete Floor Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate. Daniels Contracting Co.—Aggregate. Missouri Valley Bridge & Iron Co.—Pier Four U. S. Steel Products Co.—Steel Superstructure Heady-Tibbits Co.—Riprap. E. L. Soule Co.—Reinforcing Steel	33, 539, 49 34 dations 1,417,660,15 2,686,854,47 39,361,92 27,316,62
Concrete Floor Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate. Daniels Contracting Co.—Aggregate. Missouri Valley Bridge & Iron Co.—Pier Foundation U. S. Steel Products Co.—Steel Superstructure Healy-Tibbits Co.—Riprap E. L. Soule Co.—Reinforcing Steel Other Construction Work & Equipment: Approach	33, 539, 49 dations 1,417,660.15 2,686,854.47 39,361,92 27,316.62  5,137,779.51
Concrete Floor Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate. Daniels Contracting Co.—Aggregate. Missouri Valley Bridge & Iron Co.—Pier Foun U. S. Steel Products Co.—Steel Superstructure Heady-Tibbits Co.—Riprap E. L. Soule Co.—Reinforcing Steel  Other Construction Work & Equipment: Approach Ruildings	33, 539, 49  idations 1, 417, 660, 15 2, 686, 854, 47 39, 361, 92 27, 316, 62  5, 137, 779, 51  25, 120, 70 28, 553, 53
Concrete Floor Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate. Daniels Contracting Co.—Aggregate. Missouri Valley Bridge & Iron Co.—Pier Foun U. S. Steel Products Co.—Steel Superstructure Heady-Tibbits Co.—Riprap E. L. Soule Co.—Reinforcing Steel  Other Construction Work & Equipment: Approach Buildings	33, 539, 49 idations 1,417,660.15 2,686,854.47 39,361.92 27,316.62  5,137,779.51 25,120.70 28,553.53
Concrete Floor Raymond Concrete Pile Co.—Pier Foundation Blake Bfos.—Aggregate. Daniels Contracting Co.—Aggregate Missouri Valley Bridge & Iron Co.—Pier Four U. S. Steel Products Co.—Steel Superstructure Heady-Tibbits Co.—Riprap E. L. Soule Co.—Reinforcing Steel  Other Construction Work & Equipment: Approach Buildings	33, 539, 49  idations 1, 417, 660, 15 2, 686, 854, 47 39, 361, 92 27, 316, 62  5, 137, 779, 51  25, 120, 70 28, 553, 53

Total ...

Construction Equipment.
Tug "Escort".
Pile Driver "Haveside'
Schooner "Bangor".

5,191,453.74

13,696.91

### COMPANY EXHIBIT No. 117-Continued

Analysis of Cost of Carquinez Bridge—Total as of August 31, 1937— Continued

Labor & Materials. Feuder System.	14,039.60 597,366.28
Sub-total.	625,102.79
Total	5,816,556.53
Scales, Registers, Fog Signals & Other Special Equipment	22,561.95*
Total	\$5,839,118.48
reliminary Expenses, General Overhead Costs, Interest, Etc.	1
Damage Claim	124.50°
Engineering Office Salaries	13,478.75
Engineering Salaries & Expenses.	362,165.93*
Automobile	724.67*
Office Equipment	1,020.31*
Sub-total, Items marked (*)	390,076.11
Preliminary Expenses	476,707.70
Organization & Other Expenses 327,883.91	
Commission on Stock Sales 148,823.79	
Land David Control	688,092.56
Interest During Construction. 648,449.12	000,002.00
Interest on Bank Balances 98,964.39	/
Amortization, Bond Discount & Expense 138,607.83	
General Expenses	492,018.27
Rent of R. of W. & Floating Equipment 3,395.00	
Tax of 2% on Bond Coupons 6,353.90	
Office Supplies & Expense	
Office Salaries	. /.
Special Services	
Legal Fees	* // /:
	7
i. 608)	.1.
Directors Fees 9,631.75	
Trustees Fees	1.
Office Rent (S.F.)	
Printing, Postage, Stationery 8,604.69	m. 1.
Advertising	1 .
Trans Description Times 11 996 70	
Taxes, Revenue Stamps, Licenses 11,336.72	
Insurance	
Telephone & Telegraph	
Depreciation, Furniture & Fixtures 1,235.28	
Miscellaneous	
Credit to Antioch Bridge 34,662.31	†
Const Total Production of Lands & Pro-	67 002 AE1 17
Grand Total Exclusive of Lands & Furniture	\$7,863,451.17
the second secon	

† Red figures.

[fol. 639] Mr. Thelen: At the very outset, Mr. Gerwick, I would like to ask you if you will please indicate the pages in that exhibit for which you are responsible.

A. I have completed this from the beginning up to and including the first three items on page 26 and not on page 27 as I previously stated.

Q. As I understand it, Mr. Ready is responsible for the

remaining portion of the exhibit?

A. Yes, he is.

Q. Your work in connection with this exhibit consisted largely in the preparation of an estimate of reasonable historical cost of the piers, foundations, of the Carquine Bridge, did it not?

A. Yes, it fid.

Q. Then there are certain additional items which you have accepted, to which we may refer later, such as the superstructure and so on?

A. Yes, that is true.

Q. May I ask you at this point, you have shown how you secured the items which enter into the working platform and guide frame; may I ask you just how you secured the prices which you applied to those materials?

A. I secured prices in two ways—having my own estimates of that date, and looking back through similar work at that time and getting market prices from the producer.

Q. As a matter of fact, you were doing work very similar to this down at the Dumbarton Bridge at this very time, were you not?

A. I was, and using prices practically every day of that time and having the records as a check, and I further looked up the different companies and made, a check in getting prices at that time.

Q. Then I suppose you added the necessary transporta-[fol. 640] tion charges to the Commission as you would

price them here in San Francisco?

A. Yes, that is true. In this type of work we don't buy lumber, for instance, from the local yards but we bring it in from the north, ship's tackle, because it is cheaper that way: and when we bring it in ship's tackle we have to have a handling charge to the barge, have to pay the tolls on it and then you have the transportation to the site of the work.

Q. Now as far as wages are concerned, that would involve both the rate of wages and the efficiency of labor,

would it not?

A. Yes, it would.

Q. How did you determine the rate of wages?

A. The rate at that time was \$8.50 for pile driver men and wharf builders. At the present time the hourly rate for pile driver men and wharf builders is \$1.40 per hour.

Q. Then I suppose as far as the efficiency of labor is concerned, so that you would know how many to put in a particular gang, that that would be a matter which you would have to determine in the light of your own judgment and experience?

A. That is correct.

Q. Do you think it would be possible for a person who had not had experience in this type of work to reach an accurate conclusion on this subject?

A. I don't see how they possibly could ..

Q. Would you like to proceed with another item in con-

nection with Pier 4, such as the cofferdam?

A. Yes, I would, but I would like to further state in view of your questioning that not only has the wage rate per hour for that type of labor changed since 1925, we will [fol. 641] say, but the compensation rate then averaged about 8 p. cent. At the present time on that class of labor the manual is 25.71 per cent, which is practically the same as an increase in wages because it enters into the cost.

Mr. Thelen: May I suggest at this point, in order to keep my promise with the Commission's experts, it may be desirable to defer further direct examination on this exhibit at this point and to offer in evidence the next exhibit so that they may have that also. We now offer in evidence an exhibit entitled "Reproduction of Carquinez Bridge (new), American Toll Bridge Company" and ask that it take Respondent's Exhibit 118.

Commissioner Riley: So received and noted as Exhibit 118.

· (Here follows Exhibit No. 118-page 25.)

[fol. 642] COMPANY E2 11BIT No. 118

### Witness-Gerwick and Ready

## Reproduction of Carquinez Bridge (New)

### American Toll Bridge Company

Cases Nos. 4244 & 4259

San Francisco, December -, 1937.

[fol.	643) Carquines Bridge	
	Recapitulation of Construction Cost	
•		Reproduction Cost New 1937
a	Piers and Foundations:	11801
	a Exploration of foundations.	\$43,286.00
	b. Pier No. 1	
1, 1	c. Piers Nos. 2, 3-A & 3-B 1,786,661.34	
	d. Pier No. 4	
	e. Pier No. 5	4
	f. Piers Nos. 6, 7 & 8 62,652.44	
	g. Piers Nos. 9, 10 & 11 5,050.68	- 1- W
	h. Pier No. 12	
	wharf or treatle	De la
	j. Overhead	
	k. Total (b to j, incl.)	2,563,602.80
	1. Riprap, Piers Nos. 2 & 2	39,362.00
	Total (a to l, incl.)	2,646,250.80
	Superstructure	. 5,131,520.48
	Existing Fender System and Miscellaneous	625,103.00
1-7	a. Approach work and contributions	35,322.00
	b. Toll house building	20,000.00
	c. Other buildings	15,000.00
	d. Special equipment for toll house, bridge, etc	24,367.00
(5)	Lands	66,835.00
(6)	Furniture and Fixtures	19,668.00
(7)	Total of Items (1) to (6), Inclusive	6,584,006.28
(8)	Engineering and Inspection 6%	395,040.38
(9)		263,360.25
(10)	Preliminary Expenses Organization 3.5%	230,440.22
(11)	Total of Items (1) to (10), Inclusive	7,472,847.13
(12)	Interest During Construction	1,270,384.01
(13)	Grand Total	\$8,743,231.14
	4	

[fol. 644] Mr. Thelen: Now, Mr. Gerwick, without going into the details of this exhibit at all, am I correct in assuming that what you have undertaken to do here is to make

an estimate of the cost of reproduction of the Carquinez Bridge new, taking prices: as of 1937?

A. That is correct.

Q. Will you kindly look at page 25 and advise me whether or not you are responsible for the first three item- on page 251

A. Yes, the first three items on page 25—from the begin-

ning to that point I have prepared it.

Q. And Mr. Ready is responsible for the remaining items, is he not?

-A. Yes, that is true.

Mr. Thelen: If it is agreeable to the Commission I would like to take Mr. Gerwick from the stand now, reserving the right to examine more carefully later on concerning these exhibits, and I would like to put Mr. Ready on the stand for just a few moments.

Commissioner Riley: Very well.

LESTER S. READY, a witness called on behalf of the American Toll Bridge Company, being first duly sworn, testified as follows:

### Direct examination:

Mr. Thelen: Mr. Ready, I should like to defer qualifying you until some subsequent time so that we may get these exhibits in. If you will kindly turn to Exhibit 117, will you please point out the portions of that exhibit for which

you are responsible?

A. Referring to page 26 of Exhibit 117, commencing with item 4, general and miscellaneous expense, and the items from that point to item 13 have been my computations starting with the figures accepted from Mr. Gerwick's testimony as to items 1, 2 and 3. And on page 27, there is set forth a comparison of the original cost as recorded by the Comfol 645] pany, this amount adjusted to the reasonable historical cost as taken from the preceding page.

Q. Will you please turn now to Exhibit 118, which is the estimate of reproduction cost new, and indicate for what

portion of that exhibit you are responsible?

A. Page 25, for the figures set forth commencing with item 4 to item 13, which are built up in part upon the figures submitted by Mr. Gerwick in items 1, 2 and 3.

Q. I will ask you whether or not you have prepared an exhibit on interest during construction which you are ready to submit at this time?

A. I have a table or exhibit entitled on the first page, "Table 1, Summary, comparison of interest during construction, Carquinez Bridge," a document consisting of three tables and a chart.

Mr. Thelen: I would ask that that exhibit be introduced and marked Respondent's Exhibit 119.

Commissioner Riley: So received and noted.

A. I might just explain in a few words that this exhibit is a computation of the reasonable interest during construction applicable to the original cost of the properties and also the reasonable historical cost of the properties. And in the Table No. 2 is summarized the data from Table No. 3, and also in the righthand columns, 8 and 9, the computation of the compound interest during construction, including the total. In Table 1 is a comparison of what the books actually show, representing 9.6 per cent on the base capital. The figures computed here, applied to the entire basic capital, of 14.7 per cent, compare- with Mr. Mitchell's estimate of interest during construction of 19.1 per cent of base capital.

[fol. 646] BEN C. GEBWICK, recalled.

Direct examination resumed:

Mr. Thelen: Mr. Gerwick, will you please turn to you Exhibit No. 117, being your estimate of the reasonable historical cost of the Carquinez Bridge. As I remember it when you were last on the stand you had started a state ment of the general methods used by you in connection with Pier 4 as being somewhat typical of the other piers.

A. That is correct.

Q. And, as I remember it, you had covered item 1, the working platform and guide frame, also item 2, the coffer dam, and were about to start on item 3, excavation.

A: That is correct.

Q. Will you please state the general method used by you in connection with that item?

A. Well, you have to consider now that the working platform is in place, that your bracing has been sunk both t

position and to grade, the sheet piles have been driven and that you are now ready for your excavation. This excavation has to be done with a derrick, with a clam-shell or another type of bucket, might be an orange peel bucket, to dredge between the bracing. That requires a derrick, an engineer, deck hand, requires at least one signal man to guide the falling of the bucket between the bracing so that it won't injure the bracing or foul the bucket; it requires that there be at that particular lecation bottom drmp barges to put the excavated material in, and a towboat to tow the material out and dymp it in deep water.

[fol. 647] Q. State whether or not excavation under such circumstances would be more expensive than it might ordi-

narily be?

A. Yes, naturally, it would be a great deal more expen-

sive than ordinary excavation.

Q. In your judgment, would it be possible to have secured excavation at that time under the circumstances which you have set forth; including the excavation between the bracing, and one thing and another, for a price as low as \$1 per cubic yard?

A. No, that would be impossible; I believe it would be

an impossible cost.

Q. Were you at or about this same time engaged in excavation work in connection with under-water construction?

A. Yes, I was.

Q. Please state just what that work was?

A. At that particular time, in 1925, or in 1924 and 1925, I was engaged in laying the submarine line of the Hetch Hetchy across Dumbarton Straits, building the caisson at Dumbarton Straits, building the 36 piers for the Hetch Hetchy crossing at Dumbarton and also building the 10 piers for the Dumbarton highway bridge across Dumbarton Straits.

Q. Did any of that work involve excavation?

A. Yes, it all involved excavation below water.

Q. State whether or not the price that you here use of \$1.75 per cubic yard is the price which is based in part on your actual experience in excavation work at that time?

A. Yes, the price would be a fair price for the excavation under those conditions but not as a bid price. That is a cost price to the man who is actually doing the work.

Q. Will you please turn to item 4, "Pre-cast concrete piles" and state what you did in connection with that item?

[fol. 648] A. In building and driving precast concrete piles you first have to have what we call or term a casting yard.

Q. A what yard?

A. Casting yard. That requires, depending on the number of piles, a considerable area. That has to be leveled off and then we bed wooden sleepers to a level grade and then on those sleepers you nail a wooden bottom, very similar to a wooden floor, and then you make your side forms and set them up to the dimension of the precast concrete pile; you then place your reinforcing steel and then you place your concrete; then the forms are stripped and then the concrete is cured with water for a period generally of 30 days. After the piles are cured they have to be moved from the casting yard, transported to the site and picked up and handled by the driver, ready for driving,

Q. How much of a crew would it take to drive them?

A. For driving precast concrete piles the standard crew would be a foreman, an engineer, a fireman and not less than six pile driver men, sometimes seven and sometimes eight.

Q. I will ask you as to whether you have had actual experience in connection with the precasting of concrete

piles and the driving of such piles?

A. Yes, I have. I have made and driven precast concrete piles as large as 24 inches square and as long as 105 feet, which would roughly weigh about 30 tons each.

Q. Were there any concrete piles used in connection with the Dumbarton highway work to which you have testified?

A. Yes, there were; I can't recall the number at this time but there were several hundred used at Dumbarton.

Q. You had experience in connection with concrete piles

as early as 1910, did you not?

[fol. 649] A. I believe, if I am not mistaken, while I did not drive the first concrete pile, I believe I made and drove the first concrete pile that was driven with a hammer. At that time some had been jetted down. That was at Boston, Massachusetts, and you can find that in Ernest L. Ranson's book on concrete.

Q. As far as these particular concrete piles at the Carquinez Bridge are concerned, they were driven with a hammer?

A. Yes, driven with a hammer.

Q. State whether or not you consider the prices which you here show for the piles, for the rigging, for the driving

and for the handling to be proper prices for use at the time when these particular piles were prepared and driven?

A. I do; I consider them a very fair and reasonable price.

Q. Now, item 5, "Permanent wooden piles", that is

rather a small item, is it not?

A. There were 101 wooden piles in Pier 4, and we have a price for the piles and then a price set up for the handling, setting and driving. That is the net labor of handling and driving.

Q. Now, without going into the details, you might in connection with item 6, "Miscellaneous", simply state in gen-

erai what that item covers?

A. Item 6 covers the equipment naturally used on a job of that type and the transporting of that equipment from its base to that pier and transporting it back to the home yard. It also includes oil, fuel and water, lines, small tools, steel lines, and so forth.

Q. Were you able, by the way, to find any reference to any of these items in Commission's Exhibit No. 3 in connection with Pier 4?

A. No, I found none.

Q. Well, we will pass over item 7, "Clean-up" and 8, [fol. 650] "Gravel bottom", they being small items, and I will ask you to turn now to items 9 and 11, "General concrete cost at mix plant" and advise the Commission how

you handled that item?

A. In items ? and 11 I first set up the cost of furnishing the materials and mixing the concrete, and then later on in the other items we use that price as a unit. To get at the cost of the concrete we figured in this particular pier the number of barrels of cement and we figured them at the market price at San Francisco; figured the amount of sand that is to be used and the amount of gravel; then we have to figure our water, which includes here our tanks, pipe and our whole water system for Pier 4. The cement then has to be transported from San Francisco to the site. We have a small item set up for lost sacks, which is an item of cost we have at that time. We have the plant, and in this particular estimate we have charged half of it to Pier 4 and . half to the caisson because you would not have the two plants on the job. Finally we divide through and we find we have a cost of the concrete at the mixing plant of \$8.62 for materials, and plant and equipment; and \$1.60 for labor,

and throughout the estimate then of Pier 4 we used those

unit prices which have been developed there.

Q. Throughout your estimate wherever possible you show separately, do you not, the cost of material and the cost of labor?

A. That is right.

Q. So that what you do will be evident to anyone reading the exhibit?

A. Yes, sir, that is right.

Q. While we are dealing with the subject of concrete, Mr. Gerwick, may I ask you as to how you developed your concrete costs in connection with the smaller piers such as 1, 5, [fol. 651] 6 and so on?

A. We developed it in this way: In Pier 1 there were 575 cubic yards, in Pier No. 5 there were 1120 cubic yards; in Piers 6, 7 and 8, 1128 yards; in Piers 9, 10 and 11, 232 cubic yards, and in Pier No. 12 there were 191 cubic yards, making total concrete yardage of 3,246. That would require 4,870 barrels of cement, and taking the price at \$2.33 net at San Francisco, would be \$11.249. It would require 1200 cubic yards of sand at \$1.50, or \$1800; 2400 cubic yards of gravel at \$2.15, or \$5,160; the water, including the piping and the pipe to these various piers and the tank, would be \$2400: the freight on the cement would be \$730, 4,870 barrels at 15 cents; sack loss would be \$243; handling of cement from the barge to storage, \$487; handling of sand from barge to storage, \$120; handling of gravel from barge to our storage would be \$240; rental of the crane for handling this, at 5 cents a cubic yard, would be \$180. Then we have a one-yard mixer to move from point to point, which would be 9 set-ups and moves, which would be \$750, divided \$250 and \$500 for net lahor. Then we have the write-off on the mixer of \$500. Then handling the sand and gravel from the loading platform to the various piers would be \$900; handling cement to the same piers would be \$200 for materials and \$530 for labor; storage shed for our cement would be \$500; the net cost of mixing at 30 cents a yard would be \$162-I think I read that wrong. Would you please have read the net cost of mixing?

Q. Yes, Mr. Reporter, will you please read that?

(Record read.)

A. No, that would be \$974, that should be. Then maintenance of equipment would be \$162; the fuel would be \$125;

runways for the 9 piers and the setting up and moving of [fol. 652] them would be \$600; the chutes and elephant trunks would be \$300; the placing of the concrete would be \$3,246; the curing of the concrete would be \$268; patching and the finishing of the concrete, for materials, would be \$62, and for net labor, \$324; the form work would be \$8,000 for materials and \$4,270 for labor. That would be a total cost for the concrete in place for those piers, for materials, \$31,880, and for net labor, \$13,608. Dividing the sum of those, which is \$45,490, by the total yardage, 3,246 yards, would be \$14 a cubic yard. And then in the estimate on those particular piers we have used that item of \$14 a cubic yard in order to avoid unnecessary repetition of all these items.

Q. Now, Mr. Gerwick, without going into each individual item, I would like to ask you a general question as to the cost of concrete in connection with Piers 2, 3-A and 3-B. Did you develop that figure along the same general lines that you have testified to, or were there any significant changes?

A. We developed the cost of concrete for Piers 2 and 3 the same as we did for Pier 4, using half the cost of the mixing plant for Pier 4 and half of the cost of the mixing plant for Piers 2 and 3.

Q. In other respects, however, I take it the development of the cost would be substantially the same?

A. Substantially the same.

A. On your exhibit, page 14, item 9, "Seal concrete", is there anything that you would like to add in connection with that item?

A. We have taken the concrete, as I have the cost at Pier 4, of \$8.62 for materials per cubic yard and \$1.60 for labor, [fol. 653] and we have figured the concrete seal at 3,000 yards of concrete, and multiplying the 3,000 by the figure of \$8.62 would be \$25,860; and multiplying the \$1.60 for net labor would be \$4,800. That is the cost of the concrete alone. Now, that has to be placed under water through the pipe, in the corners, either with a tremie pipe or with a bottom dump bucket in the larger and more open part of the pier.

Q. And these prices that you show here are based on your utual experience in doing that sort of work?

A. Based on the actual experience of doing that sort of work.

Q. We will omit item 10, "Cleaning", the amount not being very large. If you will now turn to item 11, "Pier concrete", 5000 yards; do you want to add anything as to that?

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A. The cost of that item has been developed in the same way. We have taken the 5000 yards of concrete at \$6.62 for materials and plant and 5,000 yards at \$1.60 for net labor. We have then figured the forms, which is divided into meterial and net labor, and then the equipment for curing the placing of the concrete, the curing of the concrete, patching the concrete and the screeding in the top of the concrete.

Q. When you come to item 12, "Reinforcing", that is reinforcing steel, material and labor, and so on, I wish you would develop that a little so as to advise the Commission as to how you got your prices both for material and labor!

A. The base price on reinforcing steel at San Francisco, uncut, per hundred pounds in 1924, up until August of 1924, was \$3.65 per hundred pounds. From August there was a drop to \$3.35 which continued throughout 1925. [fol. 654] The reinforcing steel then had to be shipped to the Carquinez Bridge and had to be cut to length and bent and placed. You have, then, the labor of doing that, the transportation, the furnishing of the accessories such as tiewire and chairs, as we call them, and the insurance.

Q. Are the prices which you here use for labor and materials those which you know to have been in effect at that

time in this vicinity?

A. Yes; for that particular amount of steel and under those particular conditions, that is, in our judgment, the correct price, the correct cost—I will modify that,

Q. As to item 14, power line, it was necessary, of course, to get power for the operation of some of your equipment, wasn't it?

A. Yes, it was.

Q. Is there any way of getting the power other than to construct a power line?

A. Had to have a power line and a bank of transformers.

Q. Is there any way that you could have avoided the cost for back-fill shown in item 15?

A. The back-fill had to be made, otherwise there would be an increased tendency for scouring around the pier.

Q. Did you have experience in back-fill costs at or about that time anywhere else?

Yes, I was doing that kind of work around San Francisco Bay.

Q. Are the prices that you show the actual prices being

paid for that type of work at that time?

A. We have used the price of 75 cents per cubic yard

which, under those conditions, we consider quite low.

Q. Now, if you will please turn to page 16, item 16, "Riprap". How did you get the st of \$1.40 in place for your

[fel. 655] riprap?

A. We have figured the cost at the quarry at \$1 per ton; we have figured the cost of towing to the job at 20 cents a ton, which is in our judgment the correct rate, and then we have figured a cost of 20 cents per ton for placing riprap, making a total of \$1.40 per ton.

Q. Were those going figures as of that time?

A. If anything, that is a little low, a little lower than

the going figure at that time.

Q. I note in item 17 an item for contingencies of \$7500. State whether or not it is always necessary in making estimates of this character to include something for con-

tingencies ?

A. That is a total amount of \$15,000, \$7,500 for materials and \$7,500 for labor, a total of \$15,000; and on a pier. as large as Pier No. 4, built under conditions which you have at Carquinez Straits, a pier that you know would cost in the neighborhood of \$400,000, I would consider that it was absolutely necessary to have that much of a confingency.

Q. That would be less than 4 per cent, would it not?

A. Yes, that would be less than 4 per cent.

Q. Would there have been any way of avoiding item 18, insurance, both compensation insurance and public liability insurance?

A. Not under the State laws, unless a contractor was

insuring himself, which I don't think he would do.

Q. Those figures are considerably less than the corresponding figures would be at the present time, are they not?

A. Yes.

Q. We will come to that a little later. I notice under item 19, "Profit, 10 per cent" What is that item? State whether or not it is customary for contractors to figure [fol. 656] on at least some profit in connection with their work?

A. Naturally, the contractor would have to have a profit or there wouldn't be any contractors.

Q. State whether or not 10 per cent is an amount which is frequently used in that connection and was at the time

when this bridge was constructed?

A. 10 per cent is frequently used, but on a job containing the hazards of under-water construction, I think he might be criticized for using 10 per cent. I think in general the average contractor would think he would be entitled to a larger percentage.

Q. The last iten, No. 20, "Surety bonds, 1½ per cent", state whether or not it is customary to require a contractor

to give a surety bond!

A. Yes, it is customary, and 11/2 per cent for work of

that type is the customary rate.

Q. You show a total estimated cost on Pier 4 of \$422,325. State whether or not, in your judgment, that would be a fair and reasonable price to assume for the original construction of that pier?

A. I think it is a fair and reasonable - for the construc-

tion of Pier No. 4 at that time.

Mr. Thelen: Now, Mr. Commissioner, it is not my desire to go through all the other piers in the same detail but I thought it might be helpful if we would take one of these piers and have the witness develop in considerable detail just how he handled the matter, so that the Commission will be able to visualize the situation. As far as other piers are concerned, I will have relatively very few questions.

— You might turn back, if you will, Mr. Gerwick, to Pier 1 on page 1, and I have just a few questions as to [fol. 657] that. Have you before you Commission's Exhibit No. 3? I wish you would please look at page 17 of that exhibit, giving the estimate for Pier 1.

A. Yes.

Q. Then I wish you would look at your own exhibit, Exhibit 117, page 1.

A. Yes.

Q. Now, I wish to make a comparison of the items which are allowed in the respective exhibits and I wish you would state, looking at Commission's Exhibit No. 3, page 17, as to which items you there find, and then if you will turn

te year own exhibit and draw attention to the additional

items which are shown on your exhibit.

A. I find in the Commission's exhibit an item for excavation of \$1 per yard; an item for concrete and an item of reinforcing steel. I find three items there.

Q. And in addition to that you find, do you not, on page 19, an item of 5 per cent for extra work and changes in

plans?

A. Yes.

Q. And these are the only items, are they not, which you find in connection with Pier 1?

A. Those are the only ones.

Q. I wish you would look now at your Pier 1 and state the additional items which you there set forth?

A. After the excavation has been made, the excavation has to be trimmed ready for concrete.

Q. You show an item for that?

A. I show an item of \$100.

Q. Now, what next?

A. The next item which seems to have been omitted is for structural steel, which was furnished and set in the contract, which is an item of \$134. According to the regulations the men have to be paid their fares and their trans-[fol. 638] portation, and we have an item for that.

Q. Is that item in addition to the allowance which you

have heretofore made for the cost of wages?

A. Yes, that is in addition. And we have an item of \$200 for the setting up of the plant and the tools, miscellaneous equipment, that would be used. We have an item of compensation insurance, we have an item of contractor's profit, and we have an item for surety bond.

Q. Now, I will ask you, without going through a similar story as to the other piers, whether the situation as to this pier as to omitted items in the Commission's exhibit, may be deemed to be fairly typical of the situation as to

all of the piers?

A. Yes, it would seem to be typical.

Q. I wish you would turn again to Commission's Exhibit 3, page 19, under Piers No. 6 to 8, the item of concrete, 1,128 yards at \$14, equals \$15,790. Were you here when Mr. Mitchell testified as to what was included in that item?

A. Yes, I was.

Q. Did you hear his testimony to the effect that that iten includes not merely concrete but also the 12 cofferdams!

A. That is what I understood Mr. Mitchell to so state.

Q. Will you please advise the Commission as to your lest estimate of the cost of the 12 cofferdams, without for the moment going into the question of the cost of the concrete!

A. I would have to take time to make a summation of a number of items in order to give you that. He said it is cluded cofferdams and I presume it would also include the false work you would have to have in order to take the [fol. 659] driver to those piers in order to drive the cofferdams.

Q. As I remember it, there was nothing said specifically about false work; but presume for the sake of my question

that that is to be included.

A. Why, I would say roughly that the cost of the cofferdams would be about the same sum, about \$15,000.

Q. That would leave nothing left for the 1128 cubic yards of concrete, would it?

A. Would leave nothing for the concrete.

Q. Based on your wide experience in matters of this kind, do you believe it would be possible to cover Loth the concrete and the cost of cofferdams at this location for \$14 per cubic yard of concrete?

A. No, that would be an absurdity.

Q. Then on pages 23 and 24 of your exhibit you show certain items in connection with construction wharves, Am I correct in assuming those items, totaling \$84,390, represent the actual cost of those items shown on the company's books !

A. Yes, represent the actual cost of the construction wharves and the construction buildings as actually shown

on the Company's books.

Q. From your experience state whether or not you would consider that cost to have been a reasonable cost for this construction at this time and under the circumstances at the time?

A. I would consider \$84,000 a very reasonable cost for the construction wharves necessary in building a bridge of that size at a similar place to the Carquinez Bridge.

Q. Were you able to find in Commission's Exhibit No. 3 these items of general overhead or contractor's overhead [fol. 660] amounting to a total of \$113,328, or any of them!

A. No, I found no such items.

Q. Will you turn now to your Exhibit No. 118, which is your estimate of the cost of reproducing the bridge new as of 1936 and 1937, I believe?

A. Yes.

Q. Without going into details any more than we have to, in I correct in assuming, first, as to the items shown in this exhibit, that they are the same as the items shown in the preceding exhibit?

A. In general, yes; there are some additions, but in gen-

eral I have followed through the same method.

Q. Now, as to the prices used by you for wages, will you explain how those prices compare with the wage prices which you used in Exhibit 117?

A. I have here the wage scale paid certain crafts in the seriod of 1923 and 1924. In that period a carpenter re-

ceived \$8 a day.

Q. Where was that, Mr. Gerwick?

A. San Francisco and San Francisco Bay territory,

Q. What did you take to be his wage in connection with Erhibit 118?

A. The wage scale for carpenters—and I mean form carpenters—in 1936 was \$9 per day.

Q. Will you take the other principal crafts and just make

the comparison?

A. In 1923 a cement finisher was \$8.50 a day and in 1926 \$9. Hoisting engineers, the first record I can get is in 1929, which is \$9 and the rate is also set up for 1936 as \$9. For pile drivers and wharve builders in 1923 the 124 was \$8, and in 1936, beginning in June of 1936, it was \$9. In 1937, in that period, it had changed to \$11.20. For pile driver hoisting engineers in 1923 it was \$8 and in 1936-1937, part of that time it was \$10, and also in that period [fol. 661] it changed over \$12. For structural iron workers it was \$9 in 1923 and in the period of 1936-37 it started at \$11 and changed to \$12.

Q. You gave certain wages as being effective in 1923. Do you know whether those wages were also effective in

1924 and 1925 ?

A. As far as I know, they were with the exception of one change: There was a short period that the pile drivers and wharf builders went from \$8 to \$8.50.

Q. Now, I wish you would take your Exhibit 118, Mr. Gerwick, and turn to page 16, item 18, "Insurance, compensation, public liability and property damage". I wish

you would comment on that item. It goes largely to wages, as I understand it?

A. The compensation and public liability insurance are based on the labor, on the total amount of the labor. In 1936 and 1937 the basic rate for pile driver men and that builders, who would be largely employed on a structure like the Carquinez Bridge, was 25.99 per cent of the total labor.

Q. How does that compare, if you happen to have a figure

available, with the situation of 1924 and 1925?

A. It averaged about 9½ per cent in the earlier period. Excavation in 1936 and 1937, the basic rate was 11.59 per cent. I haven't the figures and could not obtain the figures in 1924 but, from my own recollection, it was running around 6 per cent. The same is true of concrete and also the same with carpenters later. The greatest changes in the compensation are in the pile driving and wharf building and in structural steel. The basic rate now for structural steel is 31.8 per cent as against an average of about [fol. 662] 10 per cent at that time.

Q. I take it these increases in the cost of insurance necessarily had the effect of increasing the amount paid for wages in connection with the construction of this bridge!

A. The compensation insurance is based directly upon the

amount of labor.

Q. I wish you would look at the same page, item 19, under the head of "Taxes, old age benefit and unemployment insurance"; those, of course, were not effective in 1924 and 1925?

A. No.

Q. What is the situation with respect to the States sales tax which you next refer to?

A. There was no sales tax at that time.

Q. Leaving for the moment the subject of wages, Mr. Gerwick, I wish you would turn now to the subject of materials in 1936 and 1937, the prices of those materials as compared with the prices for the same types of materials in 1924 and 1925; just take a few of the more important materials and compare them, please?

A. We might take the item of structural shapes.

Q. That is stee'?

A. That is steel. In January of 1924, basis of structural shapes or structural steel at San Francisco, it was \$3.60; in San Francisco in January, 1936, it was \$3.50; on

einforcing steel bars in January, 1924, \$3.65 base per andred pounds; in January, 1936, it was \$2.471/2. Cement January, 1924, was \$2.61 net per barrel, and in January f 1936, net, in cloth it was \$2.32 per barrel. I might say 1924 and 1925 in general we obtained cement in cloth ags. Now we can obta a cement in cloth, in paper c " in fol. 663] bulk. Lumber in 1924 was much higher, being noted a- \$36-\$38, the same lumber in 1936 being \$25 per housand feet board measure.

Q. Would you care to make any general comment as to he price of materials in 1936 and 1937 as compared with

924, 1925 and 1926, or would you rather—

A. I haven't made a study of it any more than I have f the principal structural materials listed month by month uring those years. Some are higher and some lower. whole, I would say more or less the same.

Q. How about the application of the State sales tax?

hat would create quite a difference, would it, not?

A. In 1936 and 1937 we would have to add, to get at the ost of any particular job, would have to add sales tax of per cent.

Q. Can you add that tax to the complete cost of the uperstructure steel so that we can get some idea of what

s involved?

a. 3 per cent of the structural steel on that bridge would

e more than \$60,000.

Q. In remaining portions of Exhibit 118 you show again, o you not, the items going into contractor's overhead on age 231

A. Yes.

Q. And the total figure is slightly in excess of the correponding figure of your earlier exhibit, is it not—about, h, between \$6,000 and \$7,000 more?

A. Yes.

Q. Then I will ask you a general question as to that whibit, as to whether in your judgment, the figures which on show are fair and reasonable figures for the items to which you have applied them during the years 1936 and 937 1

A. In best judgment, that is a fair and reasonable figure. fol. 664] Mr. Thelen: Mr. Gerwick, have you prepared m estimate of the reasonable cost of the criginal construcion of the Antioch Bridge?

A. Yes, I have.

Q. And you have your exhibit before you? A. Yes, I have.

Mr. Thelen: If the Commission please, we ask that this exhibit which is entitled "Reasonable historical cost, Antioch Bridge, American Toll Bridge Company", be introduced and given No. 120, I think it is.

Commissioner Riley: 120 is correct, sir; it will be so

received.

(Here follows Exhibit No. 120-page 4.)

[fol. 665] COMPANY EXHIBIT No. 120

Witness Gerwick

Reasonable Historical Cost, Antioch Bridge, American Toll.
Bridge Company

San Francisco, January -, 1938.

[fol. 666] Antioch Bridge

Recapitulation of Construction Cost

	- Promise of Comparaction Cost	
		Reasonable Historical Cost
(1)	Substructure	\$727,387
(2)	Superstructure	450,997
(3)	General and Miscellaneous:	200,001
	a. Approach embankments, etc.	10,000
	b. Lights, cables, signals	5,000
	e. Contractural liability insurance	3,500
(4)	Lands	1,795
(5)	Furniture and Fixtures	4,685
(6)	Total of Items (1) to (5), Inclusive.	\$1,203,364
(7)	Engineering and Inspection, 7%	84,235
$\cdot (8)$	General Overhead Expenses, 5%	60,168
(9)	Preliminary Expenses:	
	Organization, 3.5%	42,118
	Stock selling	35,451
(10)	Purchase of Lauritzen Ferry Franchise	50,000
(11)	· Total of Items (1) to (10), Inclusive	\$1,475,336
(12)	Interest During Construction, 8.3%	122,453
(13)	Grand Total	\$1,597,789

[fol.667] Mr. Thelen: Mr. Gerwick, in preparing that exhibit, state in a very general way how you proceeded?

A. We arrived at the quantities of material in the bridge through a study of the plans, a study of the records and any other data we could get on the bridge.

Q. Then did you prepare any detailed plan before you

made your actual estimates of cost?

A. No, in the case of this Antioch Bridge, we did not. As you will note, the construction is very much simpler than the Carquinez Bridge.

Q. So you didn't find it necessary to prepare plans in as

much detail as on the Carquinez Bridge?

A. That is true, we did not.

Q. What unit prices of labor and materials did you use in connection with this estimate?

A. We used the prices for materials that prevailed at that time and the prices for labor that prevailed at that time.

Q. And in connection with labor, you naturally applied the percentages for compensation and other insurance that were applicable to labor?

A. Yes, that is true,

Q. And in connection with materials, I take it you applied the percentage for sales tax?

A. No, there was no sales tax at that time.

Q. No sales tax in 1936-1937 !

A. Then I was mistaken.

Mr. Thelen: Will you read the question, please? (Question read.) I will reserve that question for the next exhibit, because you say there was no sales tax in 1924, 1925 and 1926.

A. Yes.

Q. Now, have you before you the Commission's Exhibit.

A. Yes, I have.

[fol. 668] Q. That contains, does it not, an estimate of the reasonable original cost of the Antioch Bridge and also an estimate of reproduction cost new?

A. There is a figure stated here as the estimated cost.

Q. Well, I wish you would turn to pages 1 and 2 of that exhibit and state what figures you there find in connection with the estimated original cost in so far as physical items are concerned?

A. It states on page 1 that the estimated construction cost in detail in 1924 and 1925 is \$1,023,657.

Q. Then on the next page you find an item of \$10,607 for

approaches and of \$10,000 for riprap, do you not?

A. Yes.

Q. Do you find any other figure at all referring to the original cost of the physical elements of the bridge?

A. Those are the only three figures I find.

Q. In your case I take it you have given items in considerable detail, both as to the substructure and deck, on the one hand, and the superstructure on the other?

A. Yes, that is true.

Q. And have shown to the best of your ability and in as much detail as you deemed appropriate all the items that entered into the substructure, on the one hand, and the superstructure, on the other?

A. That is true.

Q. And what is your final figure of a reasonable historical cost for substructure? Will you turn to the last page, please?

A. \$727,387.

Q. And for the superstructure?

A. \$450,997.

Q. And then you add certain small items for approach embankment, lights, cables and signals and contractor's [fol. 669] liability insurance?

A. That is true.

Q. State, please, whether or not that is as far as your participation in the exhibit goes?

A. That is true. I did not prepare items 4 and 5 and

from there on.

Q. Those are Mr. Ready's items, are they?

A. Yes, Mr. Lester Ready's.

Q. I will now ask you whether you have also prepared an exhibit of the estimated cost of reproducing the Antioch Bridge new?

A. Yes, I have,

Q. You have that exhibit before you, have you?

A. I have it before me:

Mr. Theien: We would ask that the exhibit entitled "Reproduction of Antioch Bridge new" be introduced and marked Exhibit 121.

Commissioner Riley: It will be so received and marked as Exhibit 121 by the respondent.

(Here follows Exhibit No. 121-page 4.)

COMPANY EXHIBIT No. 121 [fol. 670]

Witness Gerwick

Reproduction of Antioch Bridge (New)

American Toll Bridge Company

San Francisco, January -, 1938.

[fol. 671]

Antioch Bridge

Recapitulation of Construction Cost

		Reproduction Cost New— 1987
(1)	Substructure	\$771,902
(2)		525,476
(3)	General and Miscellaneous:	
	a. Approach embankments, etc.	10,000
	b. Lights, cables, signals	
	c. Contractual liability insurance	
(4)	Lands	1,795
	Furniture and Fixtures	4,685
(0)	Turmiture and Platures	1,000
(6)	Total of Items (1) to (5), Inclusive	\$1,322,358
(7)	Engineering and Inspection, 6%	79,341
	General Overhead Expenses, 4%	52,894
	Preliminary Expenses—Organization,	
(0)	3.5%	46,283
(10)		50,000
(10)	Purchase of Ferry Franchise	30,000
(11)	Total of Items (1) to (10), Inclusive	1,550,876
(10)	Internal During Construction 10%	155,088
(12)	Interest During Construction, 10%	100,000
(13)	Grand Total	\$1,705,964
	672] Mr. Thelen: State whether or not h you have used in your exhibit are the st	

items which you used in Exhibit 120?

A. They are the same with the exception of certain additional items for sales tax and Social Security tax.

Q. As to sales tax, I suppose in this case, as also in the case of the Carquinez Bridge, that tax is applied to the cost of material as distinguished from labor?

A. Applied to the cost of materials entering into the work and also on to the cost of any materials bought for the

work, whether it entered into the final work or not.

Q. Are the methods that you used in estimating the reproduction cost new of the Autioch Bridge in general similar to those which you used in estimating the reproduction cost new of the Carquinez Bridge?

A. In general, yes.

Q. What did you do as to unit prices for wages and materials?

A. We used in the reproduction new the unit prices of labor as of the date 1936-1937 and the labor prices of 1936-37. In the historical reproduction we used the prices of labor of 1924 and 1925 and of material at that time.

Q. Have you Commission's Exhibit 17 before you?

A. Yes, I have.

Q. I wish you would turn to page 5 and indicate any figures that you find there with reference to the various physical items which enter into the bridge!

A. I find one figure there.

Q. What is that figure?

A. \$1,004,021, estimated reproduction cost new in 1936-1937.

[fol. 673] Q. That is the only figure in dollars, is it, which refers to any of the physical items?

A. That is the only figure which I find on the reproduc-

tion cost new.

Q. On your exhibit, as I understand it, you have again divided the work into two main heads, that is, the physical work, one being the substructure and deck and the other being the superstructure?

A. Yes:

Q. And under each of those, as I take it, you have listed all the various principal items?

A. Yes, that is true.

Q. And what is your estimate of the cost of reproducing new the substructure?

A. \$771,902.

Q. And the superstructure?

A. \$525,476.

'Q. And then you are responsible also for the items appearing under 3 on the last page of the exhibit, are you not?

A. The three items under item 3, yes.

Q. From there on, again, Mr. Ready is responsible?

A. He is responsible for the items from 4 on.

Q. Turning now very briefly to another subject, I will ask you whether or not you, as engineer of the American Toll Bridge Company, have found and reported on any deferred maintenance in connection with the Carquinez Bridge?

A. Yes, I have.

Q. And what have you found, Mr. Gerwick?

A. From soundings which have been made there and from soundings which I had made there a year ago, it was found that certain riprap is necessary for the safety of the structure. And on November 19, 1937, I wrote a letter to Mr. Will F. Morrish, Chairman of the Board of Directors of the American Toll Bridge Company, stating to him the [fol. 674] amount of money I would like to spend on that structure in the next year.

A. For riprap!

Q. How much did you recommend that should be expended?

A. I recommend we should place at once 20,000 tons at a cost of \$33,000 this year. I was speaking of the year 1937. I meant 1937 or early in 1938, and that the year following we should place 10,000 tons costing \$16,500. And I told him we should add each year an amount of \$750 for the cost of taking these soundings.

Q. Is it your judgment at this, time that those moneys should be expended in connection with the Carquinez

Bridge?

A. Yes, that is true.

Q. Have you found any items of deferred maintenance in connection with the Antioch Bridge?

A. Yes, I have.

Q. Please state what those items are?

A. The bridge needs repainting, and I have so notified Mr. Morrish several times during the year 1937 and I have given him an estimate of the money I would like to spend on the painting. The total cost of the painting would be \$21,670. There is a settlement of one of the concrete spans on Sherman Island, on the approach, and the span should be tacked up into alignment, and I have estimated \$5,500 for

the work. There is a settlement on one of the spans on the east approach, and I have estimated a cost of \$2,500. And for riprap we need to place 8000 tons, which I have estimated at a cost of \$2 in place, or \$16,000.

Q. State whether or not it is your judgment that these

expenditures should be made?

A. Yes, I have so recommended to Mr. Morrish that those expenditures be made.

[fel. 675] Mr. Thelen: That is all; you may cross-examine.
Mr. Rowell: I will ask the privilege of deferring cross-examination until some other time, at the convenience of the witness, either at the conclusion of this hearing or some other future date.

Mr. Thelen: That is all right with us.

Commissioner Riley: You may be excused, then.

LESTER S. READY, recalled.

Direct examination resumed:

Mr. Thelen: Mr. Ready, you were heretofore on the stand but we were so anxious to get our exhibits into the hands of the Commission's experts that I deferred for a while qualifying you as a witness. I would appreciate it if at this time you would state briefly your training, experience and qualifcations.

A. I graduated from the University of California in May, 1912, obtaining a degree of bachelor of science in electrical engineering. From May, 1912, to December, 1913, I was employed as an assistant engineer, first in the underground distribution department and later in the power division, of the Pacific Gas and Electric Company in Oakland. From December, 1913, to December, 1926, I was employed full time with the Railroad Commission of California in various capacities. From the start until December, 1917, I was employed as an assistant engineer in the Gas and Electric Division of the Commission in connection with various rate and service matters of the gas and electric utilities of the State. From January 1, 1918, to March, 1923, I held the position of Gas and Electric Engineer of the Commission, [fol. 676] and for a portion of the time had also the title of Assistant Chief Engineer. That work covered the direction

and supervision of all engineering work of the Gas and Electrie Division, particularly referring to electric and gas rates, service and analysis of operations in connection with rate proceedings, certificates of public convenience and necessity, and so forth. From March, 1923, to December. 1926. I held the position of Chief Engineer of the Railroad Commission, supervising and directing the work of the division or department, Engineering Division, of the Commission, in all of the various utility matters which that department embraced. Certain of the more important work done included the appraisal of the electric properties of the Pacific Gas and Electric Company and the great Western Power Company in San Francisco, which was done under the direction of the chief engineer at that time. There was also appraisal work of the railway properties of the Los Angeles Railway Company, in connection with rate proceedings, and other similar work. I also directed or supervised the work in connection with telephone matters and in connection with transportation matters that were handled under my general supervision by the transportation engineer and that division or department.

From January 1, 1927, to July, 1927, I was president of the Key System Transit Company operating in the East Bay and the ferries across the Bay.

Commencing with September, 1927, to date, I have been in consulting practice handling various utility matters, mainly for municipalities and public authorities and public bodies. The first work we handled included the work of [fol. 677] consulting engineer for the Railroad Commission from September, 1927, to September, 1929, handling the telephone rate proceeding, or the work in connection with the telephone rate proceeding, involving the telephone rates in San Francisco Bay area, and later in Los Angeles on the Southern California Telephone Company. That work involved checking of the appraisal submitted by the Company and also an investigation and analysis of the operations of the Telephone Company in connection with the question of reasonable rates.

At the same time I was consulting engineer for the Department of Public Works of the State of California—I am not certain that it ran concurrently because it continued considerably thereafter—part of the time being employed by the State Engineer in connection with the Central Valley

Project to make investigations and reports on power plases of the Central Valley Project.

In the latter part of 1929 I was employed by the Division of Highways, particularly for traffic surveys in connection with the Hoover-Young Commission, who were then investigating the question of bridging San Francisco Bay. That work was carried on with the particular assistance of Mr. Davis, who has been associated with me since we started the telephone investigation, and Mr. Ward Hall, of the Railroad Commission, and with the assistance of Mr. Hunter and others of the Commission's staff. About the same time I was also employed by the Tax Commission to make a report on appraisal of the utility properties in California involved in the then question of taxation which dealt basically with the utilities paying taxes on a gross revenue basis. [fol. 678] This included telephone, electric, gas, railway, and other major transportation companies but did not in clude water utilities. In collaboration with Mr. Fankhauser, of the Commission, we made a report on value of the properties. It should be borne in mind that work was largely an office appraisal rather than any field appraisal and was made in cooperation with the Railroad Commission's engineering department.

During about the same time I was employed for a while with the California-Colorado River Commission, in connection with negotiations and various conferences dealing with the Boulder Canyon development. Since 1927 I have been in continuous employment, with the exception of one or two months, by the Bureau of Power and Light of the City of Los Angeles, dealing with valuation matters, rate matters and other matters in connection with their own electric utility and the condemnation of properties of the Edison Company and the purchase of properties of the Los Angeles Gas and Electric Corporation.

In addition my employment has included consulting work for a fairly large number of municipalities in the State, including San Diego, Burbank, Pasadena, San Bernardino, Riverside, San Luis Obispo, Tularé, Oakland, Palo Alto and certain of the northern cities; several of the irrigation and utility districts, including the Imperial Utility District, Sacramento Municipal Utility District, East Bay Municipal Utility District, the Madera Irrigation District and the Modesto Irrigation District. have been more or less continuously employed by the State Engineer, Department of Public Works, in connection [fol. 679] with the Central Valley Project, handling mainly the work in connection with power phases of that. I handled further work for the State Toll Bridge Authority in the last two or three years in connection with the question of interurban train operation across the Bay Bridge, and made a report last year for the Golden Gate Bridge and Highway District dealing with the question of bus transportation across the Golden Gate Bridge.

From 1934 to 1936 I was employed as chief consulting engineer by the Federal Power Commission in connection with the National Power Survey and Electric Rate Survey covering the entire United States. The particular work, or much of this work, has been in connection with power, telephone and gas matters, dealing with valuation rates, and so forth.

'In addition to that I handled certain work on bus service for the City of Pasadena in connection with the question of operation in that city and the traffic survey and studies for the Hoover-Young Commission in 1929 and 1930 dealing with the traffic, automobile and train traffic, across the Bay; the Golden Gate Bridge and Highway District bus traffic survey, and recently employment in connection with the competitive situation between the ferries and the bridge, for the Toll Bridge Authority, and the last two months for the American Toll Bridge Company in connection with the present investigation.

I think that covers fairly completely my experience.

Q. Will you now please turn to Exhibit 117, which is the reasonable historical cost of the Carquinez Bridge, and particularly to page 26. As I understand it, Mr. Ready, you [fol. 680] are responsible for items 4 to 13, inclusive, on that page?

A. That is correct.

Q. Will you please proceed in your own way and explain the various items, beginning with general and miscellaneous

under item 4 and the sub-heads under that item?

A. Referring to item 4 on page 26, the first item, approach work and contributions, \$35,322, is that shown from the Company's books and is identical with that included by Mr. Mitchell in Exhibit 16, page 9. Toll house buildings, the same is true—that is, it represents the book cost and

was included by Mr. Mitchell, and I believe there is no dispute as to that. Item C, other buildings, represents the book cost as shown on page 8 of Exhibit 1 and includes the Carquinez Inn, the service and comfort station, also the Miller building and another building on the south side of the Carquinez Straits. I have included these items for the reason that the two houses on the south side are located on the right of way and, in fact, partially under the bridge, and would go with the bridge to the counties when the property reverted to the counties.

Q. Have you credited the revenue that comes from those houses?

A. Yes. And as to the Carquinez Inn, representing only a few thousand dollars, it also is within the 200-foot right of way that I believe would go with the property. And in addition it eliminates a number of complications in attempting to eliminate these items. And as the estimated rents from those buildings amount to \$2200, or about 20 per cent upon the capital involved, it seems unreasonable to exclude them from the set-up and, as a matter of fact, make [fol. 681] the showing better rather than poorer from the standpoint of the earnings of the properties. But, in effect, they are properties, as I see it, which would go with the bridge and are to a certain extent part and parcel of the bridge, and in dealing with the operations of the entire property it appears to me more logical to include them than to exclude them.

The next item of special equipment for toll house, bridge, and so forth, is made up of several items which were listed apparently on the Company's books and so reported in Mr. Coleman's exhibit and accepted by Mr. Mitchell as engineering.

Q. That was i Mr. Coleman's exhibit 1 at page 7, was it not?

A. Yes. Mr. Coleman correctly lists the items and they apparently were listed under engineering, referring to page 7 of Exhibit 1, one item of \$22,561.95, equipment. Now, our study of the costs to the Company indicates this represents scales used in connection with truck operation in weighing the trucks; the various equipment in the toll house for recording tolls, collections, and so forth; also the item of lighting equipment which was put upon the bridge itself and is not an engineering item but is the construction or equipment item. Another item which goes to

make up the \$24,307 includes the office equipment of \$1,002, as well as an automobile of \$724. The items totaled together make the \$24,307. They were erroneously included under "Engineering and inspection" and should have been included under capital, direct costs. They have been, therefore, transferred on this exhibit to their correct position. [fol. 682] Q. It is always customary not to have physical items of that character included in the construction costs as distinguished from the construction overheads, is that correct?

A. That is correct. You can keep in mind that, I think all of us who worked on this realized the books of the Company were not kept as the old line utility books were kept, because they were not a utility. Some of those things are in the wrong place. And that is the case in point.

The next item of lands is given in great detail on page 28 and represents the payments for lands by the American Toll Bridge Company. One parcel, I believe parcel 5, is shown on page 28, and was still in the name of the Rodeo-Vallejo Ferry Company but is one of the parcels on which one of the main piers is located on the bridge and is an item of the cost of property purchased in connection with the bridge construction. Certain of the property is considerably more land than is directly occupied by the bridge but the salvage value is relatively minor and it seemed to me that the moneys actually spent in buying right of way, in a sense, should be included as the original cost of the lands which are a part of, you might say, the cost of the bridge. One or two items, I believe part of the Dos Rios lands, item 17, have been, and some of item 15, have been deeded to the State in connection with the highway but they represent the original investment which must be amortized. or should be amortized, over the life of the structure. And as we are not in any way assuming an increase in value because of the location of the bridge and its operation, and [fol. 683] the Company did not receive cash compensation for the deeding of certain of the properties to the State, I conclude that this item of \$66,834.62 is a reasonable and correct inclusion of the original cost as distinguished from any present value figure.

The item of \$7,632.59 listed as tide lands, Solano County, have not been included as cost of bridge lands. Certain of these tide lands are located directly under the bridge but the major portion of them extend considerable distances

on both sides and, although they might have been purchased either by the Rodeo-Vallejo Ferry Company or the American Toll Bridge Company for certain protection, I do not feel that I could logically include them in this capital account and, therefore, have excluded them.

Q. As a matter of fact, you didn't include them in any

capital account?

A. I did not, no, but I wanted to explain that item which

represents cost of land.

Following that, the item of furniture and fixtures is 80.762 per cent of the total item shown on the books and is the same as that included by Mr. Mitchell in his exhibit for that account.

Q. Why did you use the percentage of 80 plus?

A. The balance is allocated to the Antioch J ridge. That makes up the total of \$6,063,520.16, being those under items

4 to 6 plus the items testified to by Mr. Gerwick.

The next item, engineering and inspection, is the corrected item for engineering and inspection after deducting the \$24,307. In this case it represents approximately 6.03 per cent of the base cost and, in my judgment, should be used rather than a round figure of 6 per cent as suggested [fol. 684] by Mr. Mitchell.

Q. The difference between the two is very minor, anyway!

A. Yes. I mean the actual appeared to me to be the correct figure to include, as I found no reason to adjust any other figures as indicated by the records of the Company.

The next item of general overhead expense, I have included it at 5 per cent of the base cost owing to the fact from my own study of the history of the bridge and from the testimony of Dean Derleth I was convinced that a somewhat higher percentage should be allowed than would normally be allowed to cover the special contingencies or special difficulties and obstacles which the Company experienced in connection with its construction.

The item of preliminary expense, for generally the same reason, I have allowed 3½ per cent as compared to 2½ per cent, to reflect the problem and difficulties of the organization of the Company under those particular conditions which they faced at the time. There is then included the stock selling expense as an item of cost, as recorded by the Company's books, making a total of items 1 to 10 of \$7,093,387.84.

The next item, interest during construction, is covered by a subsequent exhibit and really should be referred to in order to have a clear understanding of that item.

Q. We will take up that exhibit a little later.

A. Following this page is page 27 in which I have set up in three parallel columns, in the first column the original cost as recorded, including items such as lands and furniture and fixtures which were not included in the totals [fol. 685] set up by Mr. Coleman on page 7 of his Exhibit No. 1. Otherwise the figure is the same. Then in column 3 is a summary of the estimated historical—or reasonable historical cost as shown on page 26, and in column 2 the original cost adjusted for one item, that is, the item of interest during construction, in which the percentage of 14.745 per cent of the base item, item 11, has been added to place the interest during construction on the same basis as determined from the analysis of the Company's books. This does not include any adjustments of the book costs as set forth, except for interest during construction.

Page 28 I have already referred to, the first item being the computation of furniture and fixtures and the second item the break-down of lands and rights of way. Page-29 and 30 are a tying together of the various figures with the total set forth in Mr. Coleman's exhibit. It is more to give a break-down and to indicate certain of the figures which were transferred from general engineering to construction.

Q. Now, Mr. Ready, will you please refer to Exhibit No. 118, which is the estimate of the cost of reproducing the Carquinez Bridge new, and particularly tell us about page 25.

A. On this page, again, the figures from item 4 to item 13 have been included by myself as distinguished from Mr. Gerwick. Under item 4, general and miscellaneous, the approach work and contributions have been included at the original reported cost. Items B and C, toll house building and other buildings, have been included in round figures at the approximate estimated cost to build as of 1927. Item D [fol. 686] is the same item of special equipment I have referred to before as formerly reported in the Company's books as overhead when it should have been construction. Item 5 represents lands and is the same figure as previously used, no attempt being made to appraise the lands or determine what might be the cost of buying the rights of way,

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nor reason to assume the bridge was in there and the highway in there and then they start to build the bridge, which is somewhat of an absurd assumption when you assume the land has a value with the highway and the bridge constructed. Therefore, I have included the land as originally purchased. Furniture and fixtures is the same figure to used in the historical cost. In this estimate I have used 6 per cent for engineering and inspection for the reason that the whole figure is an estimate in which the actual costs would not be available and 6 per cent is a fair figure at that time, in my judgment, to apply for engineering costs, and similarly under general overhead I have used 4 per cent. If we assume that the Bridge Company could build the bridge at that time, it must be kept in mind that much of the opposition and interference and trouble that occurred in 1926 regarding bridging any waterway had been eliminated through the experience and acquiescence by the interest of the people in the bridging of the Bay and the Golden Gate Bridge, and the building of a bridge with 135-foot clearance across the Carquinez Straits would not involve the same difficulties and problems that it did in 1926. Preliminary expense and organization I have included at 31/2 per cent to cover not only organization but any stock expenses that were incurred, as compared with 21/2 per cent plus an [fol. 687] amount—or 31/2 per cent plus stock expense in the historical. In my judgment, if a private company could build the bridge or could be assumed to have built the bridge and had a franchise sufficient to justify building the bridge, 3½ per cent would be a reasonable allowance for organization and stock selling expense.

Interest during construction has been computed on a different basis than that used in connection with the historical cost. It was assumed that the bridge would be constructed over a total of approximately a 3-year period of which there would be 6 months prior thereto for all the preliminary organization; that money would cost 7 per cent, as will be indicated hereafter, and that the cash in the bank would earn one-half of one per cent. I made some inquiry as to the reasonableness of the one-half per cent and also checked with the Company's books. During the period of 1936 and 1937 the Company received on relatively small deposits one per cent in a few cases. In most cases where they had on deposit over \$25,000 or \$30,000 the interest rate which it received was one-half of one per cent, and in one case one-

quarter of one per cent. So with that information available I used one-half of one per cent as a credit for money in the bank. A general approximate program of construction was laid out, or of expenditure was laid out, and it was assimed that out of a total of \$8,000,000 which we took as a base total expenditure, one-half million dollars would be raised by the promoters at the beginning of their promotion, which would be represented in a sense by stock money; that at the end of the first 6 months that the balance, making a [fol. 688] total of 40 per cent of the total money, would be raised by sale of stock, and that at the end of 1935 the balnce of the money would be raised through the sale of bonds. that the time or the period that entire money would be wailable would be less than the entire period of construcion, or promotion and construction. On that basis the inerest during construction on a simple interest basis worked at 16.55 per cent, and on a compound interest basis 17.77 per cent. And as a result I adopted 17 per cent for the inerest during construction on that basis.

ELLIOTE MCALLISTER, a witness called on behalf of Amerian Toll Bridge Company, being first duly sworn, testified stollows:

# Direct examination:

Mr. Thelen: You are assistant cashier of the Bank of Caliornia, I believe, Mr. McAllister?

A. Yes, sir.

Q. And how long have you been connected with that bank?

A. Almost 18 years--171/2 years.

Q. Are you familiar, Mr. McAllister, with the rates of inerest paid by the Bank of California in San Francisco during the years 1936 and 1937?

A. Yes, sir, I am.

Q. Are you also familiar in general with the rates of increst paid by other banks in San Francisco during those ame years?

A: Yes.

Q. I will ask you, Mr. McAllister, whether you are failiar with the rules and regulations of the Federal Reserve ystem with reference to the rates of interest which banks; hich are members of that system, were authorized by the system Board of Governors to pay following January 1, [fol. 689] 1936?

A. Yes, I am familiar with that.

Q. Do you know, Mr. McAllister, whether or not a private corporation, not operated primarily for religious, philanthropic, charitable and similar purposes, could have made a savings deposit in any of the San Francisco banks at any time from January 1, 1936, to date?

A. No, the regulation of the Federal Reserve Board prohibits corporations created for a profit from having sav-

ings accounts.

Q. Now, Mr. McAllister, let us assume that a private corporation having, say \$6,000,000 available, had come to the Bank of California shortly after January 1, 1936, and had stated that it desired to use this money from time to time for the payment of bills on the construction of a bridge in the years 1936 and 1937 and that in the meantime it desired to secure such interest as was possible on the unexpended money; and suppose that this corporation had asked the advice of your bank as to how to secure the largest available interest rate on the unexpended portions of that money; what advice would you have given them, Mr. McAllister?

A. We might have taken a small part of it on a fixed deposit, on which we would have allowed interest at one-half of one per cent. That would have been the maximum we would have considered, and I think we would have only wanted a small part of the deposit. That probably would also be contingent on an active balance at the same time.

Q. That is, that would be an active balance of moneys on which no interest would be paid?

A. On which no interest would be paid.

Q. Do you know what the practice of the larger number of [fol. 690] the San Francisco banks was on that same sub-

ject during that same time?

A. Very much the same. I can't speak for all of them, but by and large money rates were very easy and banks had surplus deposits they didn't know what to do with. They had to turn to the short term government market, which was netting them anywhere from .15 of one per cent to .40 of one per cent, or turn to the bankers' acceptance market on which the average rate during 1936 was .15 of one per cent, and the rate stayed there until the fall of 1937 and then it advanced to about 7/16ths of one per cent. But rates were

very low and we had a very hard time to place surplus de-

posits, hard time handling them.

Q. It is a fact, is it not, that there might have been one or two banks in San Francisco which, on amount of money not totaling as much as \$6,000,000, might have paid slightly more than the percentages to which you have testified?

A. Yes, I believe so; yes, that is probably so, but it would be subject to private negotiation. Public funds are paying one-half of one per cent and city deposits or state deposits were receiving—well now, let me be more specific: On city deposits I understand they are receiving one-half of one per cent. On State deposits the law provided for 2 per cent interest until the last Legislature, at which time the minimum was changed to one per cent. That was done because it was impossible to place money at 2 per cent. And when those deposits were taken there were other compensating balances on which no interest was paid.

Q. Suppose this particular concern, Mr. McAllister, had turned to the New York banks to see whether they could put the money there, what would they have found, do you hap-

[fol. 691] pen to know?

A. Yes, the New York banks had an even more difficult problem than they did out here in San Francisco, and I doubt if the treasurer of the American Toll Bridge Company could have placed any money on deposit in New York banks. I don't think they would have taken it and paid interest on it.

LESTER S. READY, recalled.

Direct examination resumed:

Mr. Thelen: Mr. Ready, as I remember, we had completed our testimony with reference to Exhibit No. 113. Would you like now to proceed with Exhibit 119, which is the exhibit dealing with the subject of interest during construction?

A. Yes.

Q. May I ask you one or two additional questions about other columns there. The column headed "Interest during construction," 34 of one per cent", that seems quite clear; that is one-twelfth of 9 per cent, of course.

A. Analysis of the cost of money to the American Toll Bridge Company, as indicated by Exhibit 1, Mr. Coleman's exhibit, and by studies which will show up later, shows a cost of money to the American Toll Bridge Company of practically 9 per cent, and in this computation interest during construction is capitalized at 9 per cent on amounts expended—you might say plus 9 per cent on moneys on deposit, less 3 per cent on moneys on deposit, which becomes 9 per cent on moneys expended and 6 per cent on moneys deposited.

Q. Now, if you will please move forward toward the beginning of the exhibit, to Table 2, the figures there shown are [fol. 692] the figures shown on Table 3 but arranged by 6

month periods, are they vot?

A. That is correct with the exception of 1927, when only 5 months are included. The figures shown on Table 2 are the totals of the 6 months' period and then to those figures shown in columns 2, 3, 4, 5, 6 and 7 have been added columns 8 and 9 to compute the interest during construction on the compound interest basis of 9 per cent for the period in question. That is, on simple interest the total interest during construction was \$986,230, and on compound interest at 4½ per cent every 6 months it would amount to \$1,057,050, showing a percentage of the base capital of 15.9 per cent in simple interest and 17 per cent on compound interest.

So that the interest during construction, as a percentage of the total capital, on a simple interest basis would be 13.7 and on a compound interest basis 14.7—I believe the exact figure is 14.745 per cent of the base capital, of the moneys expended up to the—I mean the total moneys expended, exclusive of interest during construction. That 14.745 per cent was thereafter applied in determining the reasonable his orical reproduction cost of the bridge.

Q. In other words, that is the percentage which you use, isn't it?

A. Yes, that is correct.

Q. 14.79

A. Yes. Now, for comparative purposes I have set forth in the next item the interest during construction computed by Mr. Mitchell on the basis of his Exhibit 16, where he assumed 8 per cent interest on bonds, no stock, and a 3 per

cent interest earned upon the balance. That results in 19.1 per cent as a basis as compared with 14.745 set forth here. [fol. 693] Q. Is it a fact, then, that the amount which you have included for interest during construction in your estimate is considerably less than the amount which Mr. Mitch ill

finally uses?

A. It is less than what he finally used on a much less base. The reason it is different, or one of the main reasons, is that though the higher interest rate has been used the Company did not have on deposit, and not sell stock or bonds shead of its expenditures until 1925 and all that is chargeable to interest during construction is the interest on money they spent during that first year and a half approximately. in which they spent nearly \$1,400,000. Had they sold stock. say enough to net \$1,500,000 to start with, then there would be a fairly large interest during construction on moneys on deposit and not used. This is, I feel, the correct interest during construction applicable to the property on a historical basis, with the one possible exception that we have computed a figure which charges up part of the interest on moneys in bank in excess of the credit for interest we earned, to the Antioch Bridge, while the money was really used largely for the Carquinez Bridge.

Q. Will you now please turn to Exhibit 120, which is the

reasonable historical cost of the Antioch Bridge!

A. Yes. In this exhibit, the last page, Mr. Gerwick has testified as to items 1, 2 and 3. Item 4 represents the matter of lands. The Company's books up through 1936 showed \$1500 for land. In 1936 or first part of 1937 they purchased some additional lands at a cost of \$295, and that has been added. The records do not show what was paid for these specific lands in all cases. However, to check the \$1500 we got the assessed valuation by the counties of this. [fol. 694] land, and that multiplied by 2 approximated \$1500, to which was added the \$295 of purchase in 1937. I believe it was. Furniture and fixtures, item 5, is the balance of the total furniture and fixture account which was allocated to the Antioch, the other amount of some approximately 80 per cent being allocated to the Carquinez Bridge. Item 6 is a total of items prior thereto. I have in this estimate set up 7 per cent for engineering and inspection, compared with 6 per cent on the other bridge, for generally the same reasons as I expressed for other items in the Carquinez Bridge estimate. The bridge was constructed at

the time when—was one of the first of that type of bridges to be built here in the west. There were some complications for a private company. They made designs for a low level bridge and later had to re-design it for a high level bridge and, in my judgment, 7 per cent, rather than 6, would be reasonable for this item—a considerably less item in amount than is shown on the Company's books.

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General overhead expense is the same percentage, 5 percent, as was allowed for the Carquinez Bridge which was under construction at the same time, and although they had possibly more difficulties with the Carquinez Bridge than the Antioch, relative to cost, I would judge they had about the same preliminary expense; organization, 3½ per cent, the same as I testified to before in connection with the Carquinez Bridge; stock selling expense included as shown by the books.

Item 10 is the purchase of the Lauritzen Ferry franchise, for which a payment of \$50,000 was made as shown by the books, and represents in a sense a purchase of, or a clear-[fol. 695] ance of the right of way for operations of the bridge by the purchase of an otherwise competing ferry. This same item was included under general expense by Mr. Mitchell in his estimate of historical and, I believe, reproduction cost new.

Q. Exhibit 17, page 5, also page 3 of the same exhibit.

A. Yes, as shown in Exhibit 17, page 5. This item was included by Mr. Mitchell under general expense. Mr. Mitchell's total per cent, other than that, I believe is 4½ compared with the figure of 5 per cent used here. Interest during construction, which is the last item he computed, is estimated at 8.3 per cent. In this case we didn't go through the Company's records as we did in the case of the Carquinez Bridge to get the expenditures month by month. But the bridge was started in June—no, started in March, 1924. The franchise was granted in June, 1923, and we laid out an estimate of expenditures which would approximate the item of organization and preliminary engineering by the time the construction period started, starting the organization and preliminary work in July, 1923, and estimating the total expenditure up to March of \$120,000, the expenditure by the end of 1924 of \$520,000 and a total expenditure for the basis of computing the rate of interest of \$1,500,000 at the end of 1924, and I computed interest then on the basis of 3/4 of a per cent for a month or 9 per cent per annum of

moneys expended up to each month, and then added an count of \$11,528 which represented the amount of interest represented the amount of cost of money in excess of the il. 696] credit of 3 per cent, or 6 per cent apon the bank balor for the last 6 months of 1925, which was the period in ich money was available from bonds and in which money searned on deposit in the banks. That totaled, against the llion and a half expenditure, \$139,403 on simple interest \$144,458 on compound interest, or on 9.3 per cent in the case and 9.64 per cent in another. This was the money mt up to the date the bridge was put into operation. Subment to that date approximately \$240,000 was expended no interest during construction has been included on t amount. The result of it is that the 9.64 per cent inest on moneys spent up to the date of opening of the dge represented 8.3 per cent on the total moneys exnded on the bridge. And the 8.3 per cent was then applied the base cost before interest during construction in Exit 120, giving \$122,453. This is slightly less than the are used by Mr. Mitchell on a somewhat lower amount, to the fact that in general no interest has been computed on moneys except those actually spent, from the start of s bridge up to within 6 months of its completion. That it was financed in a sense from hand to mouth and if there s any interest due the promoters they didn't collect it of these expenditures.

2. Does that complete Exhibit No. 120?

L. Yes.

Would you turn now, please, to Exhibit 121, which is estimate of reproduction of the Antioch Bridge new?

Yes.

. And to the last page of that exhibit.

L. In this case the em of lands and furniture and fixl. 697] tures shown on the last page are the same as those forth on the historical basis. Engineering and inspechas been taken at 6 per cent, and general overhead exse 4 per cent. This bridge in 1936 and 1937, if it were built at all, would not encounter the same opposition same difficulties in the sense that it did in 1924 and 1925. I I have used as more or less applicable to engineering er cent and general everhead of 4. Again preliminary ense has been included as I did in the reproduction cost he Carquinez Bridge as  $3\frac{1}{2}$  per cent to cover both orization and any cost of stock selling. Purchase of the ferry system franchise has been included at the price originally paid for it. Interest during construction in this case has been computed in general on the same basis as it was for reproduction of the Carquinez Bridge on the assumption that the moneys would be made available through stocks and bonds and that that would cost 7 per cent per annum, that the money would cost 7 per cent per annum and the credit of one-half of one per cent on bank balances would be deducted. On this basis the interest during construction came out 10.1 per cent, and I have used in this computation 10 per cent for interest during construction. I believe that completes that exhibit.

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Mr. Thelen: Having completed these particular exhibits, if it is agreeable to the Commission I would like to ask Mr. Ready to step aside for a while and put on a number of other witnesses who will take only a short time each.

Commissioner Riley: That is agreeable.

[fol. 698] CHARLES DERLETH, JR., recalled.

Direct examination resumed:

Mr. Thelen: At the last hearing Mr. Rowell asked us to present a copy of the War Department permit first containing reference to the construction of fenders. I will ask you, Mr. Derleth, whether you recognize the document which I am now handing you as a photostat copy of that permit?

A. This is a photostatic copy of the first permit approved by the Chief of Engineers on the 16th of April and by the Secretary of War on the 17th of April, 1923.

Mr. Thelen: We will offer this document in evidence and ask that it take the cext exhibit number which I think is 122.

Commissioner Riley: 122 is correct. It will be received as Exhibit 122.

Mr. Thelen: I may at this point draw attention to the fact that the language relating to a fender is contained in paragraph 4. Now, I will ask you, Mr. Derleth, whether you have had prepared a number of copies of letters passing between the War Department and the American Toll Bridge Company and also a few passing between the Department of Commerce, Lighthouse Service, and the American Toll

ridge Company, referring to a temporary fender, permaent fender and protection by lights, fog horns, and so on, ir navigation?

A. These are exact copies of 27 pieces of correspondence at the American Toll Bridge Company, the War Deartment engineers and the officers of the Lighthouse Serve of the United States. These documents refer historial 699] ically to the development of the permanent fender and its construction and are the issued orders for temporary protection preceding the construction of the permanent ander.

Q. Please state whether or not in the latter part of the ries of letters are also a number of letters setting forth quirements of the Department of Commerce, Lighthouse ervice, relative to lights, fog horns and other protective evices to give warning to navigation?

A. In the latter portion of the series of 27 letters there are structions and orders of the Lighthouse Service for lights, g signals, and so forth, for the various portions of the ridge and particularly the fender.

Mr. Thelen: I would ask, if the Commission pleases, that is entire set of letters be together introduced and take ir next exhibit number, 123.

Commissioner Riley: They will be received and noted as whibit 123, consisting of letters from the War Department.

Q. Right at that point, Mr. Derleth, will you make that bint clear? In other words, there seems to have been pubts in the minds of some people as to whether it would thave been possible to move right in from the beginning ith the permanent fender system, entirely regardless of e tem, orary fender system, and thus to have eliminated e expense of the temporary fender system. And I would obliged if you would direct your attention to that point d state, if it is a fact, why that sort of thing is not at all asible.

ol. 700] A. The American Toll Bridge Company could the build a permanent fender until the War Department had proved one and ordered one. The War Department, as execords clearly show, was not ready in those early pioneer ys to decide upon a fender, floating fender versus permant fender. The whole issue was unique and a pioneer ne. No fender of that type had ever before been built in

such deep water and on such soft ground and in swift cur-

rents and in the presence of ocean-going ships.

Q. As you look back on the situation now, Mr. Derleth, do you think it was at all in the cards to have constructed a permanent fender at the outset without incurring the temporary fender expense!

A. No, the ships were necessary. Even if the later bridges in San Francisco, such as the Bay Bridge, the center anchorage of the Bay Bridge had temporary fenders around it in the form of docks and floating equipment. We had to build and install temporary fender system in order to expedite the work and let the steel erection proceed, otherwise the whole period of construction would have been extended.

JOHN T. WHITMIRE, a witness called on behalf of the American Toll Bridge Company, being first duly sworn, testified as follows:

Direct examination

Mr. Thelen: You are the secretary of the American Toll Bridge Company?

A. Yes.

Q. And have been so for how long? A. About the last 11 years, since 1926.

Mr. Thelen: Mr. Rowell, you asked for a copy of whatever contract the American Toll Bridge Company had with [fol. 701] the Raymond Concrete Pile Company, and I am presenting this witness as secretary of the Company to identify the document.

Mr. Rowell: All right.

Mr. Thelen: I will ask you first if you will look at what purports to be an agreement of January 24, 1925, between the American Toll Bridge Company and the Raymond Concrete Pile Company, and will ask you whether or not that is a true and correct copy of a record from your office?

A. Yes, it is an exact copy of it; it has been compared and

is accurate.

Mr. Thelen: We will offer this contract in evidence and ask that it take our next exhibit number, which I believe

Commissioner Riley: 124; so received and marked.

Mr. Thelen: I will ask you also, Mr. Whitmire, as to whether you found among the records in your office a copy of a letter dated January 29, 1925, from the American Toll-Bridge Company to the Raymond Concrete Pile Company?

A. Yes.

Q. Referring also to relations between the two companies?

A. Correct, yes.

Q. And is the document which I hand you now a true and correct copy of this letter which you found in your records?

A. Yes, it is.

Mr. Thelen: We will ask that this letter to which reference has just been made be introduced and marked Exhibit No. 125.

Commissioner Riley: It will be received and marked as

Exhibit 125 of respondent.

[fol. 702] Mr. Thelen: Now, I will aks you, Mr. Whitmire, whether you were able to find any other contract, in the form either of a formal agreement or of a letter agreement, between those two parties?

A. No other, no, sir.

Mr. Thelen: That is all, thank you.

Mr. Rowell: No questions:

J. Wilbur Haines, a witness called on behalf of the American Toll Bridge Company, being first duly sworn, testified as follows:

# Direct examination:

Mr. Thelen: Mr. Haines, you are a partner of Haskins & Sells, are you not?

A. Yes, sir.

Q: And a certified public accountant?

A. In California, among other States, yes.

Q. We won't ask you to give the entire list; as long as you are in California we will be satisfied. What familiarity have you had with the affairs of the American Toll Bridge Company?

A. I have been in charge of the auditing of the accounts since my connection with the San Francisco offices of my firm in 1934. That means I would handle the semi-annual audits,

as the case may be, for 1934, 1935 and 1936, which have been conducted under my supervision, and also the registration of securities in May, 1935.

Q. Have you before you, Mr. Haines, a copy of Railroad Commission Exhibit No. 22 prepared by Mr. Coleman.

A. I have such a copy, yes.

Q. Have you observed in connection with that document, Mr. Haines, that the exhibit makes no allowance for dividends during the 10 years in which none were declared? [fol. 703] A. There is no such allowance in it.

Q. And have you observed that the exhibit deals merely with assumed average situations over the next 10 years?

A. Yes.

Q. I will ask you also whether you have noted that the exhibit does not undertake to show how much cash will actually be required during any one of those next 10 years?

A. That is right.

Q. I will ask you also whether you have noted that the amount shown on that exhibit as being required for interest on and amortization of bonds is averaged over 10 years, whereas the life of the bonds would terminate some time in 1945?

A. Yes.

Q. Please state whether or not the spreading of that total amount needed for amortization and interest over a 10-year period yields an average figure which is substantially less than by taking the actual life of the bonds which, as I understand it, terminate on August 1, 1945?

A. Well, it is considerably less for a number of those

years, yes.

Q. However, as to the last year the situation would be a little different?

A. The last year it would be less than that, that is, the year 1945.

Q. Yes. Now, I will ask you as to whether you have noted that, under the head of "Deduct, resources", in that exhibit, there are listed certain items such as prepaid expense, which are not cash and can not be converted into cash?

A. Well, they could be convereted into cash but it would immediately have to be reinstated under going concern status and they will eventually die, but not at the beginning [fol. 704] of this period. They might conceivably become less, as insurance charges and taxes are less at the end of the life of the bridge, but not at the beginning of the period.

Q. Now, I will ask you, referring further to that exhibit, whether you have noted that under the head of "Deduct, resources", are listed certain book values which are not cash items, such as, for instance, the Rodeo-Vallejo Ferry!

A. Yes.

Q. I will ask you particularly whether you noted under the head of "Annual income necessary" that the allowance for income taxes shown on the exhibit is only \$30,000?

A. Yes.

Q. I will ask you as to whether you have computed the Federal income tax which would be necessary for each of the remaining 10½ years of the franchise under the conditions and assumptions to which I shall shortly refer?

A. Yes, they have been computed.

Q. What did you find the average amount required for

Federal income tax during this period to be?

- A. Well, it would be more nearly \$120,000 over the 10½ year period, an average of \$120,000 a year, considerably more than that in certain of the years and less in a few of them.
- Q. That average would be at least \$90,000 more than the allowance on Commission's Exhibit 22, would it not?

A. Yes, that is right.

Q. I understand there are also other items in this Exhibit 22 as to which you may desire to comment a little later?

A. Yes.

[fol. 705] Q. Now, have you read Mr. Coleman's very interesting testimony in which he undertook to apply the wasting asset theory to the facts of our case?

A. Yes, I have read that.

Q. Referring further to the wasting asset theory, I will ask you as to whether you agree that the logical application of that theory requires the return of the investment during the life of the asset, plus a fair interest and/or dividend on that portion of the investment which from time to time has not as yet been returned?

. A. Yes, I can accept that definition.

Q. Now, I will ask you as to whether you have undertaken to apply the wasting asset theory to the affairs of the American Toll Bridge Company so as to show the situation in a complete and logical way on a cash basis during each of the remaining years of the Company's franchise?

A. Yes, I have tried to do that.

Q. In making such computation you started, I take it, with the situation as of December 31, 1937?

A. Right.

Q. And, as I understand it, you have undertaken to show the situation separately and in appropriate detail as to each of the remaining years of those franchises?

A. That is right.

Q. You have prepared an exhibit, have you not?

A. Yes, I have prepared an exhibit.

Mr. Theleu: I have already given a copy to the Commissioner. We ask that this exhibit, entitled, "Estimate of cash requirements by years for period from January 1, [fol. 706] 1938, to January 30, 1948," be introduced and marked Exhibit 126.

Commissioner Riley: It will be so received and marked 126.

(Here follows Exhibit No. 126—pages 1, 2, 3, 4.)

[fol. 707] COMPANY EXHIBIT No. 126

Estimate of Cash Requirements by Years for the Period from January 1, 1938 to June 30, 1948

American Toll Bridge Company

Haskins & Sells,

Certified Public Accountants

Alexander Building, 55 Montgomery Street, San Francisco

January 18, 1938.

American Toll-Bridge Company, Valleje, California.

### DEAR SIRS:

American Toll-Bridge Company has for a number of years operated the Carquinez and Antioch bridges under franchises which expire, respectively, on March 7, 1948 and July 5, 1948. These bridges were placed in service on or about May 22, 1927 and January 1, 1926, respectively. Recent California legislation has placed the Company's operation of these bridges under the supervision of the Railroad Commission of the State of California.

In a rate proceeding now in course before the Railroad Commission consideration has been given to the determination of estimated amounts of cash necessary completely to liquidate the Company by, say, June 30, 1948, viewing the Company its a wasting asset venture. It should be noted that the Company paid no dividends to its stockholders subsequent to the time the bridges were placed in operation must the calendar year 1936, and that in the years 1936 and 1937 dividends were paid in the aggregate respective amounts of eight cents and thirteen cents per share; dividends at the rate of eight cents accumulated for the period from June 1, 1927 to December 31, 1937, based on 3,776,873 theres, less the amount of dividends paid in the years 1936 and 1937, would amount to approximately \$2,404,600.

We have at your request prepared, and attach hereto, a Statement of Estimated Cash Requirements, By Years, on Bases Set Forth Below, for Period From January 1,

1938 to June 30, 1948.

[fol. 708] The amounts used in the attached statement are based on the following information and data:

Operating and general expenses are amounts as estimated

by Mr. Lester Ready, Consulting Engineer.

Interest on funded debt and funds provided for retirement of principal together with premiums thereon are in accordance with the provisions set forth in the indenture under the first mortgage 5% serial bonds dated August 1, 1935. The principal amount to be retired at December 31, 1937, \$3,278,500.00, represents the series C and D bonds outstanding, \$3,600,000.00, less face amount of treasury series D bonds, \$133,500.00, and cash in retirement fund, \$188,000.00, at that date. The total interest requirements shown for 1938 represent the interest expense charge of \$181,491.00 applicable to net bonds outstanding during that year, less cash of \$93,060.00 in the interest fund at December 31, 1937. Obviously, cash requirements for 1938 would be greater than the amount of \$1,363,000.00 shown were it not for the application of the cash funds on hand at December 31, 1937.

Taxes have been computed on the basis of the Federal, state, and local acts now in effect.

Provision for retirement of capital stock has been made on the basis of a period of ten and one-half years, using 3,776,873 shares as the total par amount to be retired; such amount includes the par value of 57.280 shares of treasury stock in dispute. No consideration has here been given to the feasibility of such retirement of capital stock under the Company's charter.

The bases of the dividend computations are as set forth in the statement.

Effect has not been given in the attached statement to any of the following items:

Net current assets of approximately \$20,000 as shown by the Company's balance sheet as of December 31, 1937, after taking into consideration accrued Federal tax liabilities of approximately \$108,000 for the year 1937;

[fol 709] Any amounts which may ultimately be realized from disposal of the Company's investments in The Rodeo-Vallejo Ferry Company, Martinez-Benicia Ferry and Transportation Company, and American Toll-Bridge Company of California;

Dividends which may be received;

Prepaid expense items of approximately \$102,000 as of December 31, 1937.

Yours truly, Haskins & Sells.

(Here follows 1 paster, fólio 710)

Operating and General Expenses.  Debt Service:	Total \$2,556,612.00	1938 \$259,745.00	1939 \$259,74
Interest. Principal provided for retirement. Premiums on bonds called. Taxes:	752,214.00 3,278,500.00 50,538.00	88,431.00 245,167.00	162,5 400,00 6,60
On grees operating revenue (2%). California state franchise. Federal capital stock tax Federal taxes on income. Pro-Rata Retirement of Capital Stock. Dividends at 8% on Balance of Capital Stock at Beginning of Empl. Period.	279,680.00 223,543.00 42,488.00 1,288,226.00 3,776,873.00 1,733,774.00	27,260.00 24,835.00 3,939.00 50,961.00 359,700.00 302,150.00	33,30 13,89 3,96 452,13 359,70 273,37
Total	\$13,982,448.00	\$1,362,184.00	\$1,665,33
Stated in Round Amounts.  Net Dividends at 8% for Period from June 1, 1927 to December 31, 1935,  Based on 3,776,873 Shares and Spread Over Ten and One-half Years	\$13,984,000.00	\$1,363,000.00	\$1,665,00
Total (Without Considering Additional Taxes Required to Net the Amount Set Forth Above as Covering Back Dividends).	\$16.388.600.00	\$1 502 000 00	229,00

Norz.—1. The amounts used in the above statement have been determined on the following bases:

Operating and general expenses are amounts as estimated by Mr. Lester Ready, Consulting Engineer.

Interest on funded debt and funds provided for retirement of principal together with premiums thereon are in across 1, 1937, 278;500.00, represents the series C and D bonds outstanding, \$3,600,000.00, less face amount of 1938 interest expense charge of \$181,491.00 applicable to net bonds outstanding during that year, less cash of Taxes have been computed on the basis of the Federal, state, and local acts now in effect.

Provision for retirement of capital stock has been made on the basis of a period of ten and one-half years, using 3 The bases of the dividend computations are as set forth above in the statement proper.

2. Effect has not been given in the above statement to any of the following items:

Net current assets of approximately \$20,000 as shown by the company's balance sheet as of December 31, 1937, Any amounts which may ultimately be realised from disposal of the company's investments in The Rodeo-Vallejo Prepaid expense items of approximately \$102,000 as of December 31, 1937.

The above statement should be considered only in conjunction with the accompanying comments.

American Toll-Bridge Company State of Estimated Cash Requirements, by Years, on Bases Set Forth Below, for Period from Januar 1, 1938 to June 30, 1948

1988 \$259,745.00	1939 \$259,745.00	1940 \$260,075.00	1941 \$260,075.00	Year Ending I 1942 \$256.275.00	1943 \$241,205.00	1944 \$241,205.00	1945 \$241,205.00	1946 \$241,535.00	1947 \$241,535.00	June 30, 1 \$54,012
88,431,00 245,167.00	162,550.00 400,000.00 6,663.00	144,833.00 410,417.00 10,006.00	122,280.00 437,500.00 10,625.00	98,198.00 463,333.00 11,875.00	72,715.00 487,500.00 11,875.00	45,902.00 519,583.00	17,325.00 315,000.00			.,
27,260.00 24,831.00 3,989.00 50,961.00 359,700.00 302,150.00	33,300.00 13,890.00 3,962.00 152,138.00 359,700.00 273,374.00	32,900.00 26,067.00 4,000.00 152,864.00 359,700.00 244,596.00	32,800.00 25,527.00 4,000.00 170,873.00 359,700.00 215,822.00	32,600.00 26,804.00 4,258.00 190,000.00 359,700.00 187,046.00	32,080.00 28,084.00 4,478.00 208,000.00 359,700.00 158,270.00	31,800.00 29,815.00 4,771:00 231,215.00 359,700.00 129,493.00	24,200.00 31,131.00 4,762.00 116,474.00 359,700.00 100,718.00	14,200.00 17,837.00 4,327.00 359,700.00 71,942.00	13,240.00 25.00 3,692.00 359,700.00 43,166.00	5,240 25 75,761 170,873 7,195
\$1,362,184.00	\$1,665,331.00	\$1,645,394.00	\$1,639,281.00	\$1,629,589.00	\$1,603,907.00	\$1,598,042.00	\$1,210,515.00	\$709,541.00	\$661,558.00	\$262,100
\$1,363,000.00	\$1,665,000.00	\$1,645,000.00	\$1,640,000.00	\$1,630,000.00	\$1,604,000.00	\$1,593,000.00	\$1,210,000.00	\$710,000.00	\$662,000.00	\$262,000
229,000.00	229,000.00	229,000.00	229,000.00	229,000.00	229,000.00	229,000.00	229,000.00	229,000.00	229,000.00	114,60
\$1,592,000.00	\$1,894,000.00	\$1,874,000.00	\$1,869,000.00	\$1,859,000.00	\$1,833,000.00	\$1,822,000.00	\$1,439,000.00	\$939,000.00	\$891,000.00	\$376,60

Consulting Engineer.

with premiums thereon are in accordance with the provisions set forth in the indenture under the first mortgage 5% serial bonds dated August 1, 1935. The principal amount to be retired at December 1,600,000.00, less face amount of treasury series D bonds, \$133,500.00, and cash in retirement fund, \$188,000.00, at that date. The total interest requirements shown above for 1938 represent the in effect.

of ten and one-half years, using 3,776,873 shares as the total par amount to be retired; such amount includes the par value of 57,280 shares of treasury stock in-dispute. proper.

e sheet as of December 31, 1937, after taking into consideration accrued Federal tax liabilities of approximately \$108,000 for the year 1937. avestments in The Rodeo-Vallejo Ferry Company Martinez-Benicia Ferry and Transportation Company, and American Toll-Bridge Company of California.

ing comments



[fol. 711] May Thelen: Now, Mr. Haines, would you like to proceed in your own way to advise the Commission as to what you did in the preparation of this exhibit, or would you rather have me ask you questions from time to time?

A. Well, I imagine it might be best for me to tell you what is in my mind first and then answer questions that may occur to you to ask.

Q. Well, if you will kindly do that.

A. We have devoted the introductory two and a fraction pages to an explanation of the reasons and the basis of the computations included in the statement and have shown the fundamental portion of those bases as footnotes or the statement itself, which has been prepared on the basis of. eash requirements by years to the assumed end date, June 30, 1948, as the Company would have to be completedly liquidated by that date. By complete liquidation I mean, of course, the paying off of the capital stockholders at par, plus an assumed rate of 8 per cent in annual dividends based on the number of shares outstanding at the beginning of each period, which would be 4 per cent in 1948, of course. I have used as operating and general expenses the figures given to me by Mr. Lester Ready, and for amounts required under "Bebt service" I have used the amounts fixed by the terms of the indenture itself, treating the series C bonds as an issue to be retired in August of 1938, and the series D bonds as if they were practically a serial issue meeting the sinking fund dates, plus premiums on series D bonds. Since bond dates are August we have naturally taken the cash [fol. 712] provisions, seven-twelfths of the first part of the year and five-twelfths of the second half, so that the amounts shown against principal provided for retirement n any one year will not be the amounts shown to be retired n that year; it is merely the cash that would have to be provided in that year. Similarly with the interest accruals. want to direct attention to the fact that in 1938, whereas ve show a cash requirement of \$88,431 for interest, the exense item for the year is approximately \$93,000 more than hat. We have reduced the expense item to this figure of 88,000 by the amount of cash in the interest fund at Decemer 31, 1937, as shown by the balance sheet submitted to us y the Company. Similarly with the principal required for he retirement in 1938. There will be more bonds than 245,167 actually retired in 1938. That amount has been

retired by the cash balance of \$188,000 in the retirement fund for that issue. We have similarly reduced the series D, later issue, prorata by \$133,500 face amount of series D bonds in the treasury at December 31, 1937. They naturally could not be applied against series C. The premium on bonds called I think needs no explanation.

Now, we will skip the taxes for the moment. The prorata retirement of capital stock is based on a retirement of one 10½ fraction per year of \$3,776,873. The number of shares I have just stated is not the amount actually shown on the books to be outstanding at December 31, 1937. I think you are all acquainted with the item of 57,280 shares of treasury stock that are in dispute and which I think the Company contemplates will ultimately be issued and for [fol. 713] which provision must be ultimately made for retirement. The dividends at 8 per cent on balance of capital stock at the beginning of each year is, I think, self-explana-

tory, and the reason for its decreasing steadily.

Now, as to taxes, the taxes were variable quantities and caused a great deal of trouble, naturally, in the computation of the amount of cash to be required, because every time we figured a new amount for cash required on the other fixed factors the amounts of each of the taxes is changed, and the amounts of cash are shown there opposite the caption stated in round amounts and are frankly determined by methods of trial and error so that they would fit into the amount of income which would result in certain factors under the present Federal and State Tax Acts and the 2 per cent gross revenue provision of the counties. Mr. Thelen asked me a while back about the \$30,000 figure for Federal taxes shown in Exhibit 22, I believe the number is, and I can only account for the difference between that figure and what we show here, reaching a maximum of some \$230,000 in 1944, by the fact that the cash must be provided for the annual retirement of capital stock on this theory, and distributed to the stockholders. That cash becomes income to the Company and is subject to all the Federal taxes, the worst of which is the surtax condistributed profits, and such distribution is not recogniz I under the Federal tax law at present in force as a dividend credit, so the major portion of this distribution would fall in the 22 and 27 oper cent surtax brackets.

Q. May I ask at this point before you proceed, I assume [fol. 714] that you, in connection with your work as a part-

ner with Haskins & Sells, have a great deal of Federal income tax work to do, have you not?

A. Yes.

Q. In fact, almost every day you have to delve into prob-

leas of Federal income tax, do you not?

A Well, that is rather concentrated, Mr. Thelen, at the due dates of the various taxes, Federal, State and so on, and we have been very busy in the last few years advising with clients as to how much dividends they shall pay to retain a working capital position and still avoid as much surtax on undistributed profits as possible.

Q. Then your firm, and you personally, as I understand it, do have a great deal of experience in connection with the

computation of Federal taxes on income?

A. Oh, yes.

Q. Will you kindly proceed with your statement?

A. After what I have said thus far I think it is not necessary to direct any particular attention to what is contained in Note 1 on this statement. In Note 2 I am stating certain items have not been given effect in the statement. The balance sheet of the Company submitted to me recently, as of December 31, 1937, discloses a somewhat different picture from what it did at October 31, 1937, not only as to the books but in the Federal tax accrual which was omitted from the October 31st statement; and the net current assets of the Company at December 31, 1937, are only approximately \$20,-000 after giving effect to a Federal tax accrual of approximately \$108,000 for 1937. That will be a shock to Mr. Morrish. And current assets as disclosed by that statement are approximately \$400,000. And current liabilities, which in-[fol. 715] clude \$266,000 for gross revenue tax, now settled, I believe, through a decision handed down in connection with that litigation, amount to approximately \$380,000, leaving net current position of about \$22,000, without considering the Company's reserve for employes' retirement fund, but I don't think that should be considered in this particular case. I would have no objection to applying that immediately because the Company needs some working capital and that is a pretty small margin right now.

The next item I have noted as being not considered are any amounts which may ultimately be realized from disposal of the Company's investments in its two subsidiaries, the Bedeo-Vallejo Ferry Company and the Martinez-Benicia

Ferry & Transportation Company and in American Toll Bridge Company of California. The Company could not dispose of these companies at this time without inviting competition. That is why it has those companies. So I don't feel any consideration should be given to a liquidating value of the companies. The figures shown in Exhibit 22 for the Rodeo-Vallejo Ferry Company, approximately \$80,000, I believe, as of October 31, 1937, did not take into consideration the loss in connection with the piece of property sold prior to that date, such loss being about \$15,000. Furthermore. the Rodeo-Vallejo Ferry Company has no current assets and its properties, a small amount of the remaining property, is of rather doubtful value. And the Martinez-Benicia Ferry & Transportation Company, I think its current assets are not in excess of \$25,000 at December 31, 1937, and how long it can keep those is problematical. Certainly the Company: [fol. 716] could not be liquidated or could not be sold at this time with any safety to the Bridge Company itself. As to what amount the Company may be worth at the finish, whether \$60,000 or \$80,000, seems to me a very small amount to be offset against the volume of figures shown as against cash requirements.

The next item that has not been considered is dividends. which may be received. The Company received in 1936, I believe, an amount of about \$1100 from one company and about \$7000 odd from another, and in 1937 it received something less than \$6000 from one of the companies and approximately \$11,000 from another. Inasmuch as the dividends to be received are not within the control of the recipient company, I don't think they should be considered for the purpose of this sort. However, the maximum amount of dividends which the Company might receive from American Toll Bridge Company of California, based on its present stock ownership of that Company, would be not more than somewhere between \$25,000 and \$30,000 a year after the paying company had paid its own taxes on those dividends, and those dividends are partly taxable, and if it distributed all it had left. And it seems to me that those assumptions are a bit too nebulous to embody in this statement.

Finally, as to prepaid expense items of approximately \$102,000, consisting principally of prepaid taxes and prepaid insurance, they certainly should not be deducted from the amount of capital to be liquidated at the beginning. If

it is thought proper to deduct them in total at the end, after [fol. 717] they have expired, that might be done, or they might be prorated over the 10½ years and used to reduce the general operating expenses, but the effect on the whole picture would be practically negligible.

I think that is all I have to say.

Q. Would you like to return to the item of taxes and dis-

A. Well, I could point out that the gross operating reveme is precisely the tax of tax of 2 per cent on the gross operating revenue is precisely 2 per cent of the figures stated down opposite "Stated in round amounts". In other words, the cash requirements as I figure them here are entirely from bridge tolls. I might say any miscellaneous revenue that the Company has would not amount to more than about \$1000 a year. The figure used in Exhibit 22 of \$6000 consists principally of an amortization of income collected in advance, for which we will never get any more money. It is an item of \$60,000 remaining open for easements for which we have collected in advance and are amortizing over the life of the easements. The California State franchise tax is paid in a given year based on the income of the preceding year; hence you will find the 1939 California franchise tax less than the 1938, although the income for 1939 is greater than that for 1938. The Federal capital stock tax and the Federal taxes on income, which consist of excess profits tax. normal income tax and the portion of the income tax described as surtax on undistributed profits, I think have been discussed sufficiently.

[fol. 718] Q. Well, I would like to ask you just a few more questions. Mr. Haines, although you have in general explained everything that you have done. Looking at the year 1938, do you find an item here stated in round amounts,

\$1,363,000, at the foot of the column?

A. Yes.

Q. That amount is somewhat less than the amounts for the immediately ensuing years. I believe you have already explained that the reason for it is because of an abnormal situation resulting from the fact that, as of December 31, 1937, there was a certain amount of cash already in hand.

A. There was \$188,000 in hand against principal retire-

went and \$93,000 in hand against interest requirement.

Q. That is the principal reason that accounts for that situation?

A. Well, if we added \$280,000 to the \$1,363,000 we would

have \$1,640,000.

Q. Yes. After you have shown "Stated in round amounts" the amount of cash which I understand you consider to be necessary in each of these years under your assumptions, you show another series of figures across the page under the head of "Net dividends at 8 per cent for period from June 1, 1927, to December 31, 1935, based on 3,776,873 shares and spread over 10½ years". Will you

kindly explain that item?

A. The Company paid no dividends subsequent to the opening of its bridges until the year 1936. In 1936 it paid 8 per cent, or 8 cents a share, and in 1937 it paid 13 cents. or 13 per cent per share. Figuring a return on the capital stock from the date the bridges were opened and setting June 1, 1927, as the beginning date and figuring 8 per cent [fol. 719] on the 3,776,873 shares outstanding at the close of this past year, for the period from June 1, 1927, to December 31, 1935, and then reducing that amount by the dividends. actually paid in 1936 and 1937, we arrive at a figure of \$2, 404,600. The method of distributing that is absolutely arbitrary, because if we were to relate that to the decreasing balance it would result in a ridiculous amount of retirements in the early years, an amount which is beyond the realm of possibility of recovering without increases in rates, which I think is out of line to expect. So that one 101/2 part of 2,-404,000 results in ten annual charges of \$229,000, and of \$114,600 in the last 6 months. That is not precisely accurate. I moved all the differences over into the last 6 months, of \$10 a year, in order to keep them in round amounts.

Q. In your opinion, does a logical application of the wasting asset theory require that consideration be given to that matter?

A. If we are to consider this as a wasting asset, as a quasi-utility, that I think is what the stockholders should

look forward to getting.

Q. From your experience with investors, which I understand has been quite broad, do you believe that people would invest their money in a wasting asset if they understood that for the first half of the time they would get no dividends at all and that in the second half the dividends would be limited to the bare cost of money?

A. Not a prudent investor.,

Q Now, Mr. Haines, I observe in your retirement of apital stock you arrange for the retirement of 3,776,873 [fol. 720] shares.

A. Yes.

Q. In your computation you have not undertaken, have you, to reduce the amount of stock to be retired by any assumed excess of resources over liabilities?

A. No.

Q. And as I understood your testimony, you found from a careful examination of the Company's balance sheet as of December 31, 1937, that there were net current assets there of only about \$20,000?

A. That is right.

Q. And in your computation you have disregarded that \$20,0001

A. That is right.

Q. In other words, you have not applied the \$20,000 to re-

duce the amount of capital stock outstanding?

A. Have not applied it in any way in this statement. As I say, the total here of the items we can measure definitely is 102, plus 20, or \$122,000; and I would hate to set any value on these other assets which have been used previously, to reduce the amount of capital to be returned at this time.

Mr. Thelen: I think that is all, Mr. Haines.

Commissioner Riley: The Commission will be in order.

Mr. Thelen: If the Commission pleases, at one of the early bearings I ventured to make the assertion that I believed it was the policy of this Commission, in the event of new enterprises which had development costs in the early years, to make up such losses later if it were possible to do so. The Commissioner evidenced an interest in that matter and asked me if I had authorities, and I said I would be glad to supply them.

ifol. 721] I find quite a number of decisions to that effect of the Railroad Commission. I have not undertaken to cite them all, simply to take typical ones, a few from the early history of the Commission, one from what you might call the middle period and then a very recent one. The early ones are by President Eshleman, and during the middle period a decision of Commissioner Brundige in the Southern Sierras Power Company and Holton Power

Company case, 18 C. R. C., 818, and one of the most recent ones by Commissioner Seavey in the Pacific Gas and Electric Company natural gas case, 39 C. R. C., 49. I would like, if I may, just to read one paragraph and then ast permission to file a memorandum of authorities. The paragraph I would like to read is from the decision of President Eshleman in Monohan, as Mayor of San Jose, vs. San Jose Water Company, in 4 C. R. C., 1101, at page 1115, where President Eshleman said,

"I am firmly of the opinion that necessary development cost, which is interest on the idle money in a plant during a reasonable time in which it may reasonably be expected not to be fully productive, is as much a part of the cost of the plant as an expenditure for pipe or right of way. What I mean definitely is this: There is presented a field for the operation of a public utility. It is known that this. utility after it is constructed and ready to begin operation can not from the beginning earn a reasonable amount on the investment. A fair degree of wise foresight prepares the business man for these losses in the early days of his business, and if such losses are not to be recouped from earnings after the plant has reached maturity, then the investor can not be expected to make such investments. But this principle does not justify the investment of money in an enterprise that does not give promise of reaching a paying basis within a reasonable time. If the business is well conceived, there will be a uniform approach from the very beginning of the operation of the completed enterprise to a fully paying basis. During the development period, therefore, there will be yearly a decreasing amount of the capital investment which is no returning a reasonable amount, and the interest upon this decreasing amount of idle capital is a part of the cost of the property which must be foreseen and prepared for by the investor and must be allowed by the rate-fixing body."

[fol. 722] LESTER S. READY, recalled.

Direct examination resumed:

Mr. Thelen: Have you prepared an exhibit, Mr. Ready, on the subject of the estimated value of the Rodeo-Vallejo Ferry Company franchise?

A. I have.

Q. Have you that exhibit before you?

Mr. Thelen: If the Commission please, we ask that that whilit be introduced and marked Exhibit No. 127.

Commissioner Riley: It will be received and marked 127, of the respondent.

(Here follows Exhibit No. 127-pages 1 and 2.)

[fol. 723]

COMPANY EXHIBIT No. 127

Witness Lester S. Ready

Estimated Value Rodeo Vallejo Ferry Company Franchise San Francisco, January —, 1938.

[fol. 724] Estimated Value to American Toll Bridge Company of Rodeo Vallejo Ferry Company Franchise

The Rodeo Vallejo Ferry Company organized the American Toll Bridge Company and aided the latter in financing the Carquinez Bridge. On the completion of the Carquinez Bridge the Rodeo Vallejo Ferry Company abandoned service, thus making available to the Bridge its entire business and eliminated costly competition such as experienced in the cases of the Golden Gate Bridge and the San Francisco Bay Bridge.

One basis of estimating the value of the franchise, or rather right to do and actual business is a comparison of costs on a relative revenue or capital basis of the several bridges.

[fol. 725] (a) Ferry Operating Revenue:

(1)	Rodeo	Vallejo	Ferry Co.,	1926	\$497,573
101	~	-		~ ~	

(2) Southern Pacific Golden Gate Co., 1936 5,263,928

(b) Bridge, Capital:

(1)	Carquinez	Bridge	12/31/27	· \	\$7,258,469
(2)	Antioch B	ridge 19	/31 /96		1 585 717

			TEC 12/01/		1,000,111
(3)	San	Francis	co Oakland	Bay Bridge	.1/.
101	-		oc ounium	Day Dirage	
	6/	30/37			55,055,614
		/			4-181

Golden Gate Bridge 11/1/37 34,127,774

### Estimated Value of Franchise:

(a) Purchase of Lauritzen Ferry Franchise by American Toll Bridge Company in connection with Antioch Bridge for \$50,000 equalled 3.15% of Bridge cost. Applied to Carquinez Bridge

\$224,000

(b) Suggested payment of \$3,750,000 for S. P. G. G. Franchise if applied to both bridges equals 71.2% of 1936 revenue of Ferry and equals 4.2% of cost of Bridges.

\$354,000 \$305,000

[fol. 726] Mr. Thelen: Will you kindly explain the exhibit, please?

A. In the figures of cost of the Carquinez bridge, as shown by the Company records and also by the estimate of reasonable historical cost as set forth in Exhibit 117, there has been no inclusion for the franchise or right to do business, or doing of business, of the Rodeo-Vallejo Ferry Company at the time the bridge was completed; that is, it was the construction of the bridge with the understanding that the Ferry Company would quit, but there was no amount set forth in construction costs or in payment for rights of way dealing with the value of the right to do business of the parent company. In order to get an idea of what might be classified as the minimum allowance for such a right, were the bridge constructed by other than the Rodeo-Vallejo Ferry Company, I made an analysis of the comparative cost for purchase of an existing ferry company in the case of the Antioch Bridge and also, applied on both a capital and revenue basis, a proposed or suggested payment for the franchise of the Southern Pacific Golden gate Ferry for its elimination from competition with the Bay Bridges. I say this would be a minimum figure because it represents, particularly in the latter case, the payment, or a suggested payment, for clearance of right of way after practically a year's competition, competitive fight, in which there has been a fairly heavy loss to the bridge in its otherwise income. In this exhibit, from which I will read the text, I have attempted to indicate what, at least on one measurement, one method of measurement, the franchise was worth. I might say in that connection that the only compensation, apparently, that was received by the Rodeo-[fol. 727] Vallejo Ferry Company for its quitting of business was certain stock of the American Toll Bridge Company of California, as payment, you might say, for the quitting of its operations, rather than the payment which might occur had a competitive fight occurred for, say, a year, as it has here in the Bay for more than a year, and then a settlement

comparable to this.

On the second page under item A is set forth the operating revenue of the Rodeo-Vallejo Ferry Company for 1926, the year preceding the completion of the Carquinez Bridge, and for the year 1936 for the Southern Pacific Golden Onte Ferries for a whole year preceding the completion of the Golden Gate Bridge and 10 months of the year in which—or 10 months prior to the completion of the Bay Bridge and 2 months in the competitive period. Then mder B is set forth the capital in the Carquinez Bridge as of December 31, 1927, the capital of the Antioch Bridge as of December 31, 1926, the investment in the San Francisco-Oakland Bay Bridge, exclusive of such moneys as were spent for the interurban operations, as of June 30, 1937, and the Golden Gate Bridge as of November 1, 1937. The figure totaling \$89,183,388 should be noted as the total of item 3 and not the total of the four figures above. The American Toll Bridge Company paid for the Lauritzen fary franchise \$50,000, which was 3.15 per cent of the bridge cost. If that were applied to the Carquinez Bridge it would amount to \$224,000. The present proposal for discussion regarding clearing of the ferries from the Bay [fol. 728] in competition with the Bay Bridge is the payment of \$3,750,000. Up to the present time it is not clear whether that is to eliminate the competition of the Golden Gate Bridge or not, but the suggestion is that that would be the case, and I have assumed that in this computation, that the ferry boat service, auto ferry service, would be eliminated from competition with both bridges and that, therefore, the cost on the basis of the sum total of the two bridges should be taken, rather than just on the Bay Bridge. On this basis the price would be 71.2 per cent of the 1936 revenue which, applied to the Rodeo-Vallejo Ferry Company would amount to \$354,000 and it amounts to 4.2 per

cent of the bridge costs, which would amount, as applied to

the Carquinez Bridge, to \$305,000.

Q. Mr. Ready, I will ask you just one question as to this exhibit, as to what, in your judgment, based on these computations, would have been a reasonable amount to be paid for the clearance of the competitive situation that would have resulted if the Rodeo Vallejo Ferry Company had continued to operate?

A. Between \$250,000 and \$300,000.

Q. Now, have you or have you not included that figure in your subsequent computations of capital or rate base?

A. I have not.

Mr. Thelen: If the Commission please, we ask that this exhibit entitled "Earning statement, Martinez-Benicia Ferry & Transportation Company, 1935 to 1937", be introduced as Exhibit 128.

Commissioner Riley: So received and noted, Exhibit 128.

(Here follows Exhibit No. 128-page 1.)

[fol. 729]

COMPANY EXHIBIT No. 128

Witness: Lester S. Ready

American Toll Bridge Company

**Farning Statement** 

Martinez-Benecia Ferry and Transportation Company

	. 19	85-1937		
		1935	1936	12 Months Ending 11/30/37 P minary Figures
(1) (2) (3)	Property & Equipment 12/31.  Depreciation Reserve 12/31.  Income Account:	\$111,207.26 82,778.80	\$112,527.90 87,308.08	\$112,600.00
(-)	Transportation Rev	93,793.19 935.26 1,399.85 3,155.00	103,917.44 857.20 427.43	
(4)	Total	\$99,283.30	\$105,202.07	\$102,297.00
	Depreciation)	\$82,281.90 4,159.12	94,553.18 3,012.18	96,702.00 mincl. above
(6) (7) (8)	Net	\$86,441.02 \$12,842.28	\$97,565.36 \$7,636.71	\$96,702.00 \$5,595.00
	Land Sales, Etc	\$9,687.28	\$7,636.71	\$5,595.00

[fol. 730] Mr. Thelen: Will you explain that exhibit please?

A. The Martinez-Benicia Ferry & Transportation Conpany is owned by the American Toll Bridge Company and is operated across the Carquinez Straits between the Carguinez Bridge and the Antioch Bridge and renders a complementary service to the Carquinez Bridge, largely taking travel from Eastern Alameda and Contra Costa Counties and Some from the Bay area. It is a part of the general service across the Carquinez Straits and river. It seemed advisable to have in the record a statement of the earnings of this Company for the last 3 years. This statement shows the amount of property as shown by the Company's books, amounting to approximately \$112,000; the depreciation reserve as of the end of each year, varying between \$80,000 and \$90,000; the income, which in 1935 was a total of \$99,-283, that is, the gross income; 1936, \$105,202, and the preliminary figures for 1937. \$102,297. Item 8 of the table shows the net earnings from the operation, exclusive of profits from sale of lands, and so forth, as follows: 1935, \$9,687.28; 1926, \$7,636.71; 1937, \$5,595 as a preliminary figure.

Q. Assuming that the Carquinez Bridge were required to reduce its tolls, is there any doubt in your mind that the Martinez-Benicia Ferry Company would be compelled, by reason of that reduction, to reduce its rate of fare?

A. Well, if any material reduction is made on the Carquinez Bridge my answer is yes. The Martinez-Benicia rates are lower than the Carquinez Bridge rates at this time. They carry a limited amount of business, which will [fol. 731] be shown later to come from a portion of the territory south and they are supplying about 7 per cent of the total traffic across the Straits, and a reduction of rates such as suggested by Mr. Hunter would call for practically the same rates on this ferry, and I personally can not see how they would pay operating expenses under those conditions, because they would have to run practically the same number of boats, or more, and its gross revenue would be reduced materially.

· Q. In other words, in such a situation would it be your judgment that the net here shown would be entirely wiped out?

A Yes, sir.

Commissioner Riley: I wanted to ask a few questions about this, Mr. Ready. How has the business of the Mar-

tinez-Benicia Ferry Company held up over the years! Is

this comparable to its former operation?

A. I haven't the past record with me right now and I can't answer that specifically. I can say this, that as indicated here, the increase in the highway conditions, or the improvement in highway conditions, rather, in 1936 and 1937, with the completion of the East Shore Highway and the American Canyon cut-off, have tended to reduce this somewhat, while the Carquinez Bridge traffic has increased quite materially. I can get you those figures for the past but I don't have them in mind now.

Q. Are the operating rates the same in 1936 as in 1935,

That is, the tolls?

A. Yes; 45 cents plus 10 cents for passenger, as compared with 60 cents plus 10 cents for passenger.

[fol. 732] Mr. Thelen: Now, Mr. Ready, have you prepared an exhibit entitled "Cost of money and fair rate of return"?

A. Yes, sir.

Mr. Thelen: If the Commission please, we ask that that exhibit be introduced as Exhibit 129.

Commissioner Riley: So received and noted as Exhibit

(Here follows Exhibit No. 129—pages 1 to 5, inclusive, and Tables No. 1, 2 and 3.)

: [fol. 733] COMPANY EXHIBIT No. 129

Witness Lester S. Ready

Cost of Money and Fair Rate of Return

American Toll Bridge Company

San Francisco, January -, 1938.

[fol. 734] I. Original Bond Financing

The American Toll Bridge Company financed the major cost of its two bridges through two bond issues in 1925. The cost of this money is set forth in Mr. F. Coleman's Ex. No. 1 pages 16 and 17.

The cost of money obtained through the two issues may be summarized as follows:

			. 6	
A Bond Issues and Proceeds	:	è		
1. Total face value of issues			26.5	500,000
2 Bond discount and expense (Co	. Books)			373,853
Payments R. L. Dunn (cash).			******	12,639
Sub-total				86,492
1 Stock issued in connection with				,
. 65,000 shares to R. L. D				04,000
500,000 shares to Underwi	ritem		8	300,000
Total. A	A		\$1,5	90,492
4. Net Cash Proceeds		. ,		313,508
Alle . A	Straight Line		Sinking Fund	
. The state of the	Amortization		Amortization	4- 4
	Total	%	Total	%
B. Annual Cost of Money:			** *	**
1. Interest	\$475,000		\$475,000	
2 Amortisation Bond Discount				
and Expense	34,325		18,659	
Sub-total	\$509.325	8.73	\$493,659	8.48
3. Amortisation of stock issued	. 4000.020	0.10	4100,000	4.40
to R. L. Dunn	5,200	* *	2,827	
Underwriters	40,000		21,744	1
Total 0		0.71	er10: 000	. 0. 07
Total	\$554,525	9.71	\$518,230	9.07

[fol. 735] II. Refinancing, 1935

The Company in 1935 refinanced thru 5.5% bonds of a total par value of \$4,300,000. Bonds were in four series ranging from one to ten years.

Series A, B and C were to be retired in one to three years. Series D bonds were due at end of ten years, but trust indenture requirements called for actual retirements annually as follows:

Series	Amount	Date to be Retired	Period Years	Premium	Period Times Total Amount Dollar Years
ABCD1233	\$350,000 350,000 400,000 400,000 400,000 425,000 455,000 475,000	8/1/36 8/1/37 8/1/38 8/1/39 8/1/40 8/1/41 8/1/42 8/1/43	1 2 3 4 5 6 7 8	\$10,000 10,000 10,625 11,375 11,875	\$350,000 700,000 1,200,000 1,640,000 2,050,000 2,613,750 3,264,625 3,895,000
7	505,000 540,000	8/1/44 8/1/45	10		4,545,000 5,400,000
(A) Co	4,300,000 Weighted A	4,350	3,875	53,875 893 yrs.	25,658,375
(a) Fa		sue			
(c) Bo (d) Pr	nd Discount a	& Expense			194,027.70 53,875.00
(e)					247,902.70

	7	
[fol. 736]	Straight Line	Sinking Fund
	Amortization	Americation
(2) Annual Cost. Interest. Discount, Expenses & Premiums	\$236,50% 42,017	\$236,500 36,260
•	\$278,517	\$272,760
(3) Cost in % of Net Proceeds	6.78%	6.65%
(B) Average Cost including Amortisation & expense & premium of original is		bond discount
Unamortised Bond discount & expense original is Premium on bonds		\$440,521.88 131,300.00
Total		\$571,821.88
(1) Annual Cost new Bonds	Straight Line Amortisation \$278,517 96,915	Sinking Fund Amortization \$272,760 83,640
(3) Total	\$875,432 9.45%	\$356,400 8.95%
The net proceeds thru the refinancing were \$4,105,972.50 -\$181,300 -\$3,974.6	72.80	

## III. Comparative Cost of Money

(A) Many of the major utilities regulated by the Railroad Commission serve extensive areas and diversified business and have been well established going concerns. Some of these are Pacific Gas and Electric Company, Great Western Power Company, Los Angeles Gas and Electric Corporation, the Pacific Telephone and Telegraph Company, San Diego Consolidated Gas and Electric Company and San Joaquin Light and Power Corporation.

A comparison of the cost of money to such utilities in 1925 and also in 1935 with that to American Toll Bridge Company will indicate to a considerable extent the relative hazard and also reasonable or fair return allowable.

Table No. 1 attached sets forth costs of bond money to such utilities during 1922 to 1928 based on bonds issued.

The cost of bond money to such utilities in 1925 would [fol. 737] appear to be between 5.65% and 6.35% compared with cost of first mortgage bonds of the American Toll Bridge Co. of between 8.1% (not considering Bonus stock) and 8.37% (Bonus sto a included).

Approximate Ratio  $\frac{8.23}{6.00} = 1.37$ 

(B) Many of the major utilities refinanced in 1934, 1935 and 1936 at materially reduced interest rates. Table No. 2

sets forth the cost of proceeds as a result of the refinancing. This cost for major utilities varied between 3.74% and 412% and for smaller utilities from 4.56% to 5.40%. Refinancing of American Toll Bridge Company in 1935 was at a cost of 6.65%.

Approximate Ratio large Utilities  $\frac{6.65}{4.00} = 1.66$ " smaller "  $\frac{6.65}{6.65} = 1.33$ 

Chart No. 1 shows graphically the relative cost of money of the utilities and American Toll Bridge Company.

(C) Table No. 3 compares the average cost of money for several major utilities with the rate of return found reasonable and allowed by the Railroad Commission. These money costs include average of bond, preferred stock issues and depreciation reserve moneys as incurred based on issues outstanding at the time of study.

In the period of Regulation prior to the World War the Railroad Commission in several main cases allowed 8% return as reasonable where borrowed (Bond) money cost approximately 6%. Subsequent to 1918 with increased federal income taxes and greater development and stabilization of utilities a lesser margin has been allowed. Decision No. 9404, 20/CRC/402 fixing rates for Southern California Gas Company in its eastern area found 9% reasonable where money cost 7% owing to hazard of natural gas service and other factors.

Summarizing Table No. 3 the following shows ratio of fair return to historical cost of money.

			Fair Return	Ratio	
921	Southern Calif. Gas Co.	7%	9%	1.28	
929	The Pacific Tel. & Telegraph Co.	6.09%	7.0%	1.15	
930	Los Angeles Gas & Electric Corp.	6.14	7.0	1.14	
932	San Joaquin Light & Power Corp.	6.36	7.0	1.10	
932	Midlands Counties Pub. Serv.				
	Corp	5.81	7.0	1.20	
933	Pacific Gas & Electric Co.	5.82	6.7	1.15	
135	San Diego Cons. Gas & Elec. Co.	6.43	6.7	1.04	

In the case of San Diego Co. failure to refinance during the low cost of money period of 1927 continued a high cost of money which was reduced shortly after the Commission decision of 1935.

[fol. 738] Applying the ratio of 1.15 which has been applied to the more stable utilities to the American Toll Bridge Company cost of first and second mortgage bonds gives the following:

Money Cost based on non inclusion of Bonus stock,  $8.48\% \times 1.15 = 9.75\%$ .

Based on inclusion of Bonus stock, 9.07 x 1.15 = 10.43%.

The above would suggest that 10% return would be a reasonable return for the American Toll Bridge Company.

The American Toll Bridge Company's properties are being amortized on the 6% Sinking Fund basis so that the average cost of money may be assumed to be made up of Bond and Stock money and Depreciation reservice monies varying as the reserve increases. The following indicates the fair return based on 1.15 times the average cost of money for the entire period.

Year	% Capital	% Accrued Reserve	Average Cost of Money 9% Bonds & Stock 6% Depn. Reserve	Fair Return 1.15 x Cost %
.1926	98.92	1.08	8.9676	. 10.313)
1927	98.55	1.45	8.9565	10.300 Aver-
1928	96.73	3.27	8.9019 .	10.237 age
1929	94.15	5.85	8.8245	10.148)
1930	91.48	8.52	8.7444	10.056 9.986%
1931	88.63	11.37	8.6589	9.958
1932	85.44	14.56	8.5632	9.848
1933	. 82.03	17.97	8.4609	9.730
1934	78,41	21.59	8.3523	9.605)
1935	74.59	25.41	8.2377	9.473 ) 9.473
1936:	70.54	29.46	8.1162	9.334)
1937	66.25	33.75	7.9875	9.186)
1938	61.70	38.30	7.8510	9.029)
1939	56.87	43.13	7.7061	8.862)
1940	51.76	48.24	7.5528	8.686)
1941	46.34	53.66	7.3902	8.499 8.3329
1942	40.59	59.41	7.2177	8.300
1943	34.50	65.50	7.0350	8.090
1944	28.04	71.96	6.8412	7.867)
1945	21.20	78.80	6.6360	7.631
1946	13.94	86.06	6.4182	7.381
1947	6.25	93.75	6.1875	7.116
1948	1.72	98.28	6.0516	6.959

	100000	5 i*			1		- 1	0														48	31
	Diect Per	Exp. On	6.40%	6.16	9.51	28	20.00	6.83	o eo e	6.40	5.59	5.67	5.849	6.68	5.345	6.59	9.45	6.62	5.65	2.00	282	6.40	6.39
	Value	Outstanding	\$1,937,500	4,999,500	4 (00 000	7,545,000 8,962,000	10,000,000	4.633,000	200	1,500,000	2,500,000	25,000,000	2,000,000	2,000,000	96,000	10,000,000	10,000,000	25,000,000	10,000,000		20,000,000	3,000,000	2,000,000
	Z	Bonds	6/30/30		28 19			12/31/30		*	* *	12/31/27	12/31/32			6/30/29	* *						
******	Sold								288		22.22	2 91.00		22	82	a	88	88	5	58		38	
al Bond Is		Year		5% 19	9	0, 2	2		6% 1924		5% 19.	-					. 10	2%		16	2%		6% 192
Ioney—Certain Individua		Bonds	General & Refunding				First & General	Unifying & Refunding	3 3	First & Refunding		Refunding	First & Refunding		First Myg. & Ref.	First & Ref. Mtg.		28		3 3		First & Ref. Ser. "C"	
Cost of h		Company	L. A. G. & E. Corp.					8. J. L. & P. Corp.		8. D. C. G. & E. Co.		The P. T. & T. Co.	So. Calif. Gas Co.		•	P. G. & E. Co.						G. W. P. Co. of Calif.	
	Commission	Date	11/24/30					5/24/32		27730 2/.4/35		11/27/29											
	lirond	No.	23102	, cy				24809		25 27730		21766	****						1	0			
Ifol. 780)	California R	No. / No.	2747 . 6					3008		3152-3 25		2462 165				2225 8	* *					2235 5	

31—704

402							
	Sinking Fund" Coet to Co.	% 923 823 823 823	8224	1444 1288	201	33.38 33.30 52.55	4004u
	Yield to Pur-	1 8 12 %	8888	***********	8 90 3 75	32.16	84.04.0 88.085.5
•	% of Total	8 888	5555	8888	88	9888	989989
& '37	Expenses of Compenses Penny		The second second	25 25 88 25 25 88 25 25 88		50,850 178,722 131,178 13,117	78,329 113,095 36,019 27,662 12,071
1935, '36	% to Under- writers	2 222	8888	នខ្លួនន	528	8888	25522
C. R. C. in	Offering Price	2 2 2 2 2 3	2222 325 325	98.5 102 88.5 102 103	99.6-101.8	100.5	102.5
by	Price to Company	355828 35828	8888 255		8.25~101.56 99	98 103 100 100 5	100 100 100 100 100 100 100 100 100 100
Bonds	Tabi Amount Issued	13,500 10,000 10	8888		88	8,500,000 26,000,000 1,460,000	10,000,000 5,000,000 2,051,000 3,400,000 1,022,000
Basis of Issue of Certain	Bond Description	lat 4.3 due 1966 1st 5e " 1961 1st 4s " 1965 1st & Gen. 4s, due '70 1st & Ref. "G", 4s '84	"H" 3½ "61	lst 4s, due 1965 Ref. 33/4s, due 1960 Ref. B, 33/, " 1960 1st & Ref. 4s, due 1960	& Ref.	lst 4s, B, due 1965 Ref. 3 % B, due 1966 " 3 % C, " 1st 3 %, due 1966	1st 4s, B, due 1961 1st 5s, due 1965 1st 3y, A, due 1961 1st 4ys, due 1960 1st 3ys, A, due 1960
	Company Gas & Electric Cos.	1936 The Cal. Ore. Power Co. 1 Calif. Public Service Co. 1 1935 Coast Co. G. & E. Co. 1 L. A. G. & E. Corp. 1 P. G. & E. Corp. 1		1935 S. D. C. G. & E. Co. S. C. E. Co., Ltd.	So. Calif. Gas Co.	1935 Assoc. Tel. Co. Ltd. 1936 The P. T. & T. Co. 8anta Barbara Tel. Co.	Water Companies: 1936 Calif. Water Serv. Co. 1935 Calif. Water & Tel. Co. 1936 San Jose Water Wks. 1935 So. Calif. Water Works. 1957 San Jose Water Works.
[fol., 740]	රි කු	1936 The Coali	1936	1935 S. L	So	1935 Ass 1936 The	Wat. 1936 Cal. 1935 Cal. 1935 San. 1935 So.

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Averago
-Weighted
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Cost

Historical as of Dates Specified Table No. 3

Rate Proceeding Before the C. R. C.

Return Considered Reasonable By C. R. C.	9.00	17.0	966
of Money Cost	6.09%	6.36%	6. 43%
Statement As Of	12/31/27	6/30/29	12/31/32
No. Exhibit By	20/C. R. C./406 165 Mr. Fankhauser (CRC)		25 Mr. Coleman (CRC)
Utility	Gas Teleph.	Georgia Electric	Gas, Steam
Rates Involved. Company	So. Cal. Gas Co The P. T. & T. Co.	B. J. L. & P. Corp. M. C. P. S. Corp.	P. G. & E. Co. S. D. C. G. & E, Co.
Decision Date			
		24809	
No. of Case or Appl.	2462	3008	3424

[fol. 742] Mr. Thelen: Will you please proceed in you own way, Mr. Ready, and explain what you have done in the exhibit?

A. I believe I will read a considerable portion of the ter of this exhibit in order to bring out what it sets forth. The first heading is "Original bond financing" and I will rethere. "The American Toll Bridge Company financed th major cost of its two bridges through two bond issues 1925. The cost of this money is set forth in Mr. Coleman Exhibit No. 1, pages 16 and 17. The cost of money obtains through the two issues may be summarized as follows' And the table shows a total face value of bonds issued \$6,500,000; bond discount and expense of \$673,853; page ments to R. L. Dunn in cash of \$12,639, making a sub-total of \$686,492. In addition stock was issued in connection wit the bonds, 65,000 shares to R. L. Dunn and 500,000 share to the underwriters which, at the net price at that tim totaled \$104,000 and \$800,000, respectively. Net car proceeds would be \$5.813,508 on item 1, minus item 2.

Follows then sub-heading B of annual cost of money. set forth the interest both on a straight line and the 6 percent sinking fund basis. Amortization of bond discount an expense is listed under item 2, showing the cost of mone on a straight line basis of 8.73 per cent and on a sinking fund basis of 8.48 per cent.

Amortization of stock issued to Mr. Dunn and the underwriters, item 3, would increase the cost to 9.71 on the straight line basis and 9.07 on the sinking fund basis; the is, the money cost this Company on that basis 9 per cen [fol. 743] that representing first and second mortgage bonds, which normally would be fairly comparable to firm mortgage bonds and preferred stock of another utility.

"Refinancing, 1935. The Company in 1935 refinance through 5.5 per cent bonds of a total par value of \$4,300,000. The bonds were in four series ranging from 1 to 10 years. Series A, B and C were to be retired in 1 to 3 years. Series D bonds were due at end of 10 years, but trust indentur requirements called for actual retirements annually as follows"—

And then follows a table which shows the amount of factivation of bonds to be retired each year, the date to be retired the period of years that the bonds would be out, the

primiums required to be paid under the indenture—that is, they had to be called and a 2½ per cent premium paid during the period except for the last two portions of the series D tends. In the last column is set forth the period times the total money, which would have to be paid at the calling of the bonds, that being used to determine the weighted average period in which the bonds were out. This shows an average period of 5.89 years as the average period of the loan. Under "A" following is determined the cost of money, item I showing the bonds issued and item B the net cash proceeds:

item C, bond discount and expense, and "D" the premiums that would have to be paid. In effect, as I see it, the Company really had a discount and expense of \$247,902.70, and [fol.744] that represents the difference between the money actually received and the amount of money that would have to be paid when the bonds were retired.

On page 3, item 2, is shown the computation of the annual cost of money which, on the straight line basis, is 6.78, per it and on the sinking fund amortization basis, 6.65 per cont—that is, amortizing the bond discount and expense over the average life of the bonds. As this is a relatively short period that figure is practically the same as would be obtained were it figured out by each portion of the various series separately and I did not go through the more detailed computation of taking each series through.

Then under "B" is the average cost, including amortization of unamortized bond discount and expense and premium on original issue. As Mr. Coleman points out in his report, there was unamortized bond discount and expense as of August 1; 1935, on the preceding bond issues of \$440,521.88, and the premium on bonds outstanding of \$131,300 was paid, making a total of \$571,821.88.

Following that is shown the annual cost of new bonds, taken from the summary at the top of the table, to which has been added amortization of \$571,821.88 over the remaining period of the life of the bonds issued in 1935. This gives an annual cost of the moneys throughout the remaining period of 9.45 per cent on the straight line basis and 8.95 per cent on the sinking fund basis. In that case the premium on the original bonds has been deducted from the cash received on the refinancing bonds to give the net cash received by the transaction. It is interesting to note that the cost of the [fol. 745] original money was 9.07 and the cost of the money

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continued through the life of the total bond issues would be 8.95.

The next portion of the exhibit I discuss the comparative cost of money of this Company with the utilities which the Commission has generally been called upon to give serious consideration to, particularly as to the cost of money and rate of return.

"Many of the major utilities regulated by the Bailread Commission serve extensive areas and diversified business and have been well established going concerns. Some of these are Pacific Gas and Electric Company, Great Western Power Company, Los Angeles Gas and Electric Corportion, the Pacific Telephone and Telegraph Company, Sa Diego Consolidated Gas and Electric Company and San Joaquin Light and Power Corporation.

"A comparison of the cost of money to such utilities in 1925 and also in 1935 with that to American Toll Bridge Company will indicate to a considerable extent the relative hazard and also reasonable or fair return allowable.

"Table No. 1 attached sets forth costs of bond money to such utilities during 1922 to 1928, based on bonds issued."

Table 1, there is set forth from the analysis of decisions of the Commission and exhibits introduced therein the cost of money for different bond issues of several of the utilities [fol. 746] referred to. The first column gives the case number, the second column the exhibit number, which I believe in all cases were exhibits filed by the Commission's staff; the next column the decision number, date of decision, the name of the company, type of bonds, interest rate, year issued and the cost of money on the sinking fund basis for bonds outstanding as of the date set forth in the next column-I mean not the cost of money but the average price. In the last column is the cost of money including discount and expense amortized on the sinking fund basis. There were a few more we had that were not in this table, that are shown in a chart later and I will explain more regarding them.

The cost of bond money to such utilities in 1925 would appear to be between 5.65 per cent and 6.35 per cent compared with cost of first mortgage bonds of the American Toll Bridge Company of between 8.1 per cent (not con-

idering bonus stock) and 8.37 per cent (bonus stock included)."

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The 6.35 was on a bond issue not finally listed here, that is, we only listed what could be put on one page. I have compared these bonds with the first mortgage bonds because the ionds listed in Table 1 are in most cases first mortgage or general and refunding mortgage bonds and would not be comparable to the second mortgage bonds or to the average of the first and second mortgage bonds issued by the Company in 1925. This shows, if we take an average, the approximate ratio of 1.37; that is, that the bond money cost this Company 37 per cent more than the cost generally of [fel. 747] these more or less well established utilities.

"B. Many of the major utilities refinanced in 1934, 1935 and 1936 at materially reduced interest rates. Table 2 sets forth the cost of proceeds as a result of the refinancing. This cost for major utilities varied between 3.74 per cent and 4.12 per cent and for smaller utilities from 4.56 per cent to 5.40 per cent. Refinancing of American Toll Bridge Company in 1935 was at a cost of 6.65 per cent."

The approximate ratio of cost of money of refinancing as between the American Toll Bridge Company and these major utilities would then be 1.66 per cent, that is, the cost of money was 66 per cent higher than the cost of money to the large established utilities, and this was on a refinancing as distinguished from the financing of the Company which had not yet become a going concern. And the cost as compared with the smaller utilities listed in Table 2 would average approximately 1.33 per cent, the smaller utilities including the small water companies and the Associated Telephone Company.

"C. Table 3 compares the average cost of money for several major utilities with the rate of return found reasonable and allowed by the Railroad Commission. These money costs include average of bond, preferred stock issues and depreciation reserve moneys as incurred based on issues outstanding at the time of study."

Table No. 3 gives the case number, Commission decision number, the date of the decision, company involved, type of [fol. 748] utility, the exhibit number, the witness who pre-

sented the exhibit, the date of the statement as set forth in the case, the average cost of money for these various companies and the rate of return found reasonable by the Commission in the decision.

"In the period of regulation prior to the World War the Railroad Commission in several main cases allowed 8 per cent return as reasonable where borrowed (bond) money cost approximately 6 per cent. Subsequent to 1918, with increased Federal income taxes and greater development and stabilization of utilities, a lesser margin has been allowed. Decision No. 9404, 20 C. R. C., 402, fixing rates for Southern California Gas Company in its Eastern area, found 9 per cent reasonable where money cost 7 per cent, owing to hazard of natural gas service and other factors.

"Summarizing Table 3, the following shows ratio of fair

return to historical cost of money."

In the case of Southern California Gas Company the ratio is 1.28; Pacific Telephone and Telegraph Company in 1929, ratio of 1.15.

Mr. Thelen: Will you just explain a little what those ratios mean?

A. They are the ratio between a fair return found reasonable in the Commission's decision and the average cost of bond money, preferred stock money and interest on depreciation reserve.

Q. In other words, as to the first item of Sonthern California Gas Company the Commission found that a rate of return was reasonable which was 1.28 per cent of the money [fol. 749] cost?

A. 1.28 times.

Q. 1.28 times the money cost, I mean.

A. That is correct In the case of the Pacific Telephone and Telegraph Company, where the cost of money was 6.09 and the fair return 7 per cent was found, the ratio is 1.15; Los Angeles Gas and Electric Corporation, decided in 1930, the cost of 6.14 per cent, fair return of 7 per cent was allowed, or a ratio of 1.14; in the case of the San Joaquin Light and Power Corporation, determined in 1932, the cost of 6.36, fair return of 7 per cent, or a ratio of 1.10; Midland Counties Public Service Corporation decision at the same time, cost of money of 5.81, fair return of 7 and ratio of 1.20; Pacific Gas and Electric Company decision in 1933, 5.82

cot 6.7 return, or 1.15; in 1835, San Diego Consolidated Gas and Electric Company Cost of 6.43 per cent, return of 6.7 or 1.04 per cent. In the case of the San Diego Consolidated failure to refinance during the low cost of money period of 1927 continued a higher cost of money, which was reduced hortly after the Commission's decision in 1935. I am quite familiar with that particular case, as is Mr. Coleman, who made a study in this proceeding, that is, in the proceeding of 1935, and due to some local situation the Company was prevented from refinancing or could not refinance at the low cost, so that the cost of money in 1935 reflected the condition prior to the lower cost of money period when they could have refinanced. And in 1935, as is indicated by Table 2 the San Diego Company refinanced on the basis of 4.12 [fol. 750] for its bonds. It would not reduce the cost to 4.12 because depreciation was in there at 6 per cent and preferred stock was in, I believe, at excess of 6, but it would reduce the cost of money, which would still leave them with a L15 ratio, about.

"Applying the ratio of 1.15 which has been applied to the more stable utilities, to the American Toll Bridge Company cost of first and second mortgage bonds, gives the following: Money cost based on non-inclusion of bonus stock, 8.48 per cent times 1.15, 9.75 per cent; based on inclusion of bonus stock, the return would be 10.43 per cent."

That is, in a sense of the term, it would be reasonable, based on these other ratios, would be for this Company at the start, on the moneys which were invested by it, other than depresistion reserve money, at least 10 per cent.

"The above would suggest that 10 per cent return would be a reasonable return for the American Toll Bridge Company. The American Toll Bridge Company's properties are being amortized on the 6 per cent sinking fund basis so that the average cost of money may be assumed to be made up of bond and stock money and depreciation reserve moneys varying as the reserve increases. The following indicates the fair return based on 1.15 times the average cost of money for the entire period."

Then there is set forth a table showing the years 1926 to 1948 and the percentage of capital for each year that would be represented by moneys invested by the Company and not

retired through the amortization or depreciation reserve. ffol. 751] and in the next column the per cent of the accrued depreciation reserve based upon the application of the 6 per cent sinking fund basis, including the annuity plus the interest on the rese ve each year. In the fourth column is shown the average cost of money, taking bonds and stock at 9 per cent and depreciation reserve at 6 per cent, the cost being at the start 8.9676 per cent and ending up in 1948 at 6.0516 per cent. Then in the last column is shown the rate of return which would be considered fair if an allowance of 1.15 times the cost of money were applied. This shows that for 1927 it would be 10.3 per cent, for 1935 it would be 9.473, for 1940 8.68 and in 1947 it would be 7:116. I have shown adjacent to the last column the resultant average for the first 8 years prior to the refinancing, which is 9.986, or in round figures, 10 per cent. 1935 would be 9.473, or in round figures, 91/2 per cent, and the average for the balance of the period would be 81/3 per cent. I mention those because in the computations which follow I have used 10 per cent for the first 8 years, 9 per cent for the year 1935 and 8 per cent for the balance of the period. It might be interesting also to note that the average return for the entire period would be 9 per cent.

Now, there is a chart in the back of the table which shows the data regarding the cost of money as indicated by Tables 1 and 2 for the different utilities. I might state there are one or two points on this curve which do not show in the table because we did not copy more than one page of data; but it indicates in practically 1922, 1923 and 1924 the stable [fol. 752] utilities were obtaining money at about between 6 and 61/2 per cent; that the reduction in cost of money started in 1925 and continued through 1927 and 1928, this being the length of the period we took this data for, going down to between 5 and 51/2 per cent in 1927, but in 1925 the stable utilities were getting money at about 6 per cent as I indicated from my testimony. Above that point for 1925 is shown, under 1, the cost of the first mortgage bonds, assuming bond discount and expense and no amortization of bonus stock; No. 2 is the cost of the first and second mortgage bonds on the same basis; No. 3, the cost of the first and second mortgage bonds with the amortization of bond discount and expense, which averaged 9.07 per cent for the American Toll Bridge Company. At the righthand part of

the chart is shown the cost of money on mortgage, first mortgage bonds generally, for these major utilities which approximates closely 4 per cent in 1935, when at that same time this Company, with its short time franchise and a bridge operation had a cost of money of 6.65 as shown by item 4.

Q. Does that complete what you have to offer in connection with that exhibit?

A. Yes, sir.

Q. I will ask you whether you have also prepared an exhibit entitled "Distribution of automobile traffic, Carquinez and Antioch Bridges and Martinez-Benicia Ferry, American Toll Bridge Company"?

A. I have.

Mr. Thelen: If the Commission please, we ask that that exhibit be introduced and marked No. 130.

Commissioner Riley: So received and marked Exhibit 130.

[fols. 753-754] Mr. Thelen: Have you prepared another exhibit entitled "Reported and estimated traffic and revenue under present rates, Carquinez and Antioch Bridges, 1926 to 1948".

A. I have.

Q. Mave you supplied a copy to the Commission?

A. No, I have not.

Mr. Thelen: Then we will do that. If the Commission pleases, we ask that the exhibit be introduced and marked Exhibit 131.

Commissioner Riley: So received and noted as Exhibit 131.

Q. Now, Mr. Ready, have you prepared another exhibit which is entitled "Estimated earnings, American Toll Bridge Company, 1926 to 1948, present tolls"?

A. Yes, I have.

Mr. Thelen: We would ask that that exhibit be introduced and marked Exhibit 132.

Commissioner Riley: So received and marked, Exhibit 132.

COMPANY EXHIBIT. No. 132

Witness: Lester S. Ready

Extimated Earnings, American Toll Bridge Company, 1926 to 1948, Present Tolls San Francisco, January 19, 1938

#### CAPCHINE MINE COLUMN

PAST & RETINATED FUTURE
OPERATING REVENUE, EXPENSES, RATE BASE
AND
BATE OF RETURE
PRESENT RATES

A CONTRACTOR OF THE PROPERTY O		From May 21st							3	1926 - 1948			
(1) Traffie Statistics:	1986	1927	1906	1929	1930	1931	1932	1933	1934	1935	1936	3027	
Vehicular Beite										344	32	1937	19
Passengers & Palastrians	The state of	736 085	1 15k 097 2 916 539	1 262 101	1 365 579 3 392 009	1 316 198 3 209 219	1 110 001	1 023 604	1 000 140				
(2) Into Base (Historical Cost):		- 734 334	E 340 339	3 180 609	3 392 069	3 209 219	2 725 622	1 023 60L 2 555 372	1 059 LLO 2 673 218	1 199 30	3 997 995	1 720 768	1 99
Total As Of Brounder Slats Average For The Year	1 6 239 89	5 7 258 1/70	7 472 124	7 616 598	7 020 261					4		4 4/4 000	4 15
(3) Sperating Bermannes		7 106 357	7 365 297	7 544 361	7 939 364 7 777 961	7 954 142 753	7 955 495	7 946 405	7 946 433	7 945 703	7 969 119	7 940 954	
Tells		4-1-			, ,,,	1 340 (33	1 A24 978	7 950 995	7 946 1464	7 946 068	7 947 411	7 940 537	a7 94
Inste & Missellencous'.	1 2 200	657 699	986 571	1 081 307	1 193 727	1 152 297	975 911	917 117	959 229	1 0/0 000			
(i) Potal	3 38	2 236	986 807	1 050	9 595	6 220	. 7 209	7 234	7 029	7 621	8 128	1 544 691	1 43
(h) Direct Operating Repenses:			300 001	1 085 357	1 203 322	1 158 517	983 120	924 351	966 258	1 068 609		1 552 934	2.11
Zalophone, Pomer, Light		30 780	45 707	LB 971	45 176	48 062	Lielo		1		- )-4 )-7	· 7× 7×4	. 1 44
Supplies		1 162	2 990	3 958	3 654	3 997	13 548	71 155	38 884	26 409	28 458	29 300	2
Ingineering	5 .	2 791	3 223		2 54	3 626	3 125	2 271	2 933 2 387	3 007	3 037	3 045	
Maintenance - Painting		133	. 77	lala	106	6 800	2 107	3 000	3 278	1 196	2 748	1 750	
Advertising - Repairs		159	210	21.6 51.1	530	4 860	15 974	14 271	9 060		8 211	7 250	
Incurace		21 175	43 606	19 606		172	747	609	631	656	6 067	758	
Beeglieness		13 358	27 236	27 370	28 65	25 281	12 689 24 312	9 487	4 209	764	400	300	
Tames - Real Setate		688	. 111	381	656	17	200	26 020	23 790	21 970	21 688	21 975	2
- County Present on		36 165	78 853	77 Bal.	72 226	71 204	70 804	61 668	60 587	203 65 896	247	300	
- Oress Roverno (25)			1 200	1 200	.1 200	1 200	1 200	1 200	1 200	1 200	1 200	67 675	. 66
(5) General Operating Repusses		12 755	223 164	21 626 193 989	23 875	23 037	19 401	18 242	18 990	21 430	26 125	1 200 31 114	1
Salaries Impasses			_,	437.303	293 089	204 361	197 961	181 030	166 176	153 953	166 700	166. 198	175
Suplayous' Betirement			**	26 GLL	23 643	23 170	19 148	30				7. 6	-13
Food of Attorneys Dissetant Sandana	***		*			-> 410	73 140	19 325	13 611	19 179	19 906	23 248	22
				12 403	12 661	13.527	13 972	17 197	15 alo	70 54		26 520	
special services				6 113 25 040	7 899	11 115	10 128	11 313	11 795	6 041	6 925	33 628	18
Office Supplies & Expenses				25 040	3 164	8 112		2 766			0 969	29 535	6
Miscolianous				1 1/1	2 721	3 HJ1 1 975	1 488	1 043	947	1 713	2:137	2 267	2
Tenes à Liounes Foos				1.627	4 622	L No	3 299 3 990	938	1 194	278	946	1 273	ī
Total General Barrers		1- 4-		1 870	1 213	174	163	, 3 6hi	3 154	3 204	3 823	16 732	. 4
o) Total Direct & Gineral Barrens		168 288	72 012	78 942	60 399	65 960	52 488	60 b96	48 628	7 255	7 925	16 767	7
()-Interelantion Of Investment		108 132	295 206 188 827	272 931	253 400	270 321	250 440	au 526	214 794	262 167	61 625	110/970	63
8) Total Sepondos Plus Americation		276 720	HBL 053	193 916 166 817	201 519 454 807	207 Oli6	207 329	207 114	206 945	206 908	228 325	316 168 206.727	239
9) Not Income Sefere Income Tenne 0) Income Tax - Referral	3 388	363 175	500 TT4	618 530	746 515	477 367 681 150	157 778	W8 670	121 739	169 075	435 134	522 895	1445
? m Shake / Samuel 4 Samuel		5 647	.7.		9 470	30 774	以 295	9 789	514 519	999 534	879 185	1 030 039	. 994
						20 114		7 109	1 057	10 235	13 689	66 223	108
2) Beturn - On Rate Rose	3 386	357 528 6.62%	502 774	618 510	739 OLS	650 376	511 047	465 892	543 460	589 299	ner los		24
			6.825	€.20€	9.50%	8.186	6.12	5-866			065 496	963 816	861
The state of the s	3 388				70,700				6.8b.	7.127	10.80	12 12	3.0
In 1000 A and A 1000 19704, 976)	3 388	57 006°	233 756	135 926	38 753	114 299	284 4350	329 208	251 184	7.12%	229 703	12.12%	
The state of the s	3 388 3 388				38 7530		284 1350	329 208	251 184		229 703	327 853	225

Bridge Company

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7 90	5 5	16 16 110 316	767		47 65 239	321 852		. 1	35	7	24	736			7 65 山山 1 5 1 5 1 5 1 7 2	6	2	7 6	73	23	7 989 2 134 1 84 16 72	6	23	7 994 2 254 2 469 6 727		23	3 15		25 20	2 76 4 08 6 72	2	20	e 82 4 70 6 72	89 83 27	3	9 1	65 55
226 8 206 8 1,35 1 879 1	5 1	206 522 050	727 895 039		995 145 994	721 921 726		1 44	96		1 OL	7 Lake 3 Lake 3 Lake	5	1 07	6 72 8 06 0 48 7 27	9	1 0	06 TO 80 99 25 49 25 49	01	1 1	6 30 6 30	5	1 16	9 196 L 802 5 680		1 19	9 8al 1 75 0 14	7	1 21	0 30 8 47 2 40 8 00	5	1 21	5 19	22	12	3 7	88
13 6 865 L 10.6	96	963	816		24 861		-	200 89		2	91	1 50 7 77 1.55	5	92	7 34	6	9	27 6 46 8 11.9	73 100 15	9	90 30 51 17 12.09 25 20	7	3	5 05k 5 86k 2.15 5 92		97	5 45 6 16 2.29 0 19		97	6 06 2.30 2 10	7	99	2-49	78	1		774.
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367	29 1	039	Lega	90	613	94	•	35	6 64	7	21	5 09			- ).												× ×		* 1								

#### AFTICCE MIDE

#### AMERICAN TOLL DRIDGE COMPANY

## OFMATING MYDINE, ROPHING MATE MADE

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PROCEST MATERIAL

			1		4		•	11				P. 40	
	1926	1927	1926	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938
Traffic Statistics:		1 1						1:1	**				3/
Vehicular Units	81 156	208-130	163 436	198 940	199 BLO	191 050	148 00E	121 099	131 652	126 659	146 865	163 110	150 000
Passengars & Pedestrians		STT 333	369 090	اللها 350	428 78L	بلباو عدبا	319 780	121 099 246 516	275 222	261 006	296 436	143 110 209 100	303 000
hate hase (Eistorical Cost):													
Total Ac Of Documber 31st	1 35 77	175 5	1 712 923	1 719 921	1 721 284	1 735 953	1 737 540	1 737 540	明發	1 737 673	1 730 256	1 739 457	
Average For The Year	1 542 94	1 045 500	1 709 109	1 716 422	1 720 602	1 728 619	1 736 746	1 737 540	1 737 532	1 737 673	1 738 466	1 759 457	1 739 358
Colls	86 946	01.066	337 000	244 400	240 600								
Bents & Missellensons	no Arto	94 966	135 908	166 691	165 608	157 799	121 930	99 136	107 793	107 465	126 791	125 120	135 000
Total	88 946	94 966	135 908	166 716	165 728	157 679	122 050	120	120	120	120	120	120
Direct Operating Expenses:	de Jen	74 700	177 900	100 110	100 120	#31 613	122 450	99 556	107 913	107 585	, 126 911 .	125 240	135 120
Yages	10 811	11 163	10 782	10 665	11 190	19 30	11 275	11 225	11 720	0 705	8 948		1-
Telephone, Power, Light	1.070	1 799	1 122	1 361	1 358	12 394	1 343	1 538	1 396	9 705	1 386	9 970	9 940
Supplies	960	266	610	366	We	31.2	363	268	374	246	119	1 270	1 270
Incineering				,	211	1 460	950	600	600	933	106	306	
Maintenance - Painting										733	-	500	4 300
- Repairs	189	50	110	92	214	25	357	1 286	434	7 120	1 773	2 866	5 000
Advertising	8 556	بلياء و	8 7Lb	3 558	4 050	2 760	2 976	1 933	1 715	298	- 110		. ,
Insurance	5 780	7 735	11 587	12 464	11 660	11 568	11 367	11 540	10 851	7 640	7 416	8 546	8 500
Riscellansous	201,	343	63	25	25	14	237	65	. 86	32	12	19	. 25
Toxes - Real Estate	7 432	17 562	21 331	21 934	20 425	18 462	17 319	14 778	12 792	12 867	12 603	12 448	12 190
- County Franchise	1 200		1 200	1 200	1 200	1 200	. 1 200	1 200	1.500	1 200	1 200	1 200	1 200
- Gross Revenue (2%)	1 779	1 899	2 738	3 333 55 016	3 312 54 324	3 155	2 438	1 989	2 136	2 163	2 536 36 433	2 502	2 700
Total Direct Expenses	37 981	52 161	58 599	55 OLE	54 324	52 802	10 BL7	الملا ما	43 304	43 579	36 433	39 329	16 885
General Cperating Expenses:							0 01 2	0.17					
Salaries				3 954	3 255	3 290	2 541	2 136	1 569	2 451	2 615	3 050	2 150
Replayees' Notirement				1 844	1 743	1 894	1 824	1 900	1 826			3 480	
Fees of Attorneys, Directors, Trustees Public Relations (Advertising)	, 000.			1 209	1 087	1 558	1 322	1 250	1 360	9 015	2 617	4 413	1 737
Special Services				3 429	616	1 138	1 742	306	1 900	772	909	3 876	045
Office Supplies & Empasses			* 1 T	605	436	1,81	194	115	109	219	260	298	200
Compensation Insurance				* 169	375	217	194	104	138	35	124	167	232
Niecellaneous				21/2	1 075	972	938		739	700	505	2 196	232 125 130 669
Taxes & License Fece		*.		278	167	24	. 51	852 172	alio	927	1 00	2 200	600
Total General Expenses	- 2i, 000	6 773 58 934 35 685	9 940	11 717	8 754	9 634	7 271	7 135	5 981 Le 285	. 1h 119	6 060	19 660	6 008
Total Direct & General Expenses	61 981	58 934	9 940	66 735	63 078	62 436	57 118	53 577 38 160	Le 285	57 698		99 009	51 893
Anortisation Of Investment	33 215	35.685	37 269	37 151 104 186	37 563	37 Blak-	36 132	38 160	38 160 87 145	38 160	城 523 38 160	38 160	51 893 30 160
fotal Expenses Plus Amortimation	. 95 196	94 619	105 817	10L 186	100 641	100 250	95 250	91 737	87 145	95 858	82 683	97 169	90 053
Set Income Before Income Texas	6 250	347	30 091	62 530	65 087	57 599	26 800	7 819	20 468	11 727	Lily 228	28 071	45 067
Income fax - Federal	2 455								7				16 330
- State (Franchise Tax)		1-		10		em em	26 800	7 810	20 1.60				2 351
Net Income After Income Taxes	8 7050	347	30 091 -	62 530	65 087	57 599	26 800 1.545	7 819	20.468	11 727	LL 226	26 071	63 756
Return - On Rate Base	0.566	0.025	1.76	3.66	3.70	3.335	ما 87 ملا	165 935	1.186	0.67%	2.516	1.615	3.67%
- In Excess of 10% thro 1934, 9%	162 999	16, 212•	170 959•	109 1120	106 973	117 40%	1 mp diffe.	402 433	153 286	14 6570	94 BLO.	111 078-	·75 393
in 1935 & 65 for 1936-40	) 140	207 011-	1.40 000-	-	401. 301.	799 3870	946 2610	1 112 196- 1	965 140-	1 /10 1	ent	the are	
Accumulated Excess Beturn	162 799*	327 211°	799 0300	577 1510	cost rest.	ייושר נצו	-		-	1 410 1390 1	504 966° 1	OTO 0000	1 691 459

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<u>é</u> :	193	L	39	26	3	222		154	2	19	m .	191	2	; 2	SP.	ž	19	141		194	2	3	46		194	1		194	2
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791 120 911	125	120 120 240	13	120		35 000 120 35 120	-	135	120	13	120	135	120		35	000 120 120	13	12	0	135	000 120 120	13	12	0	135	120			60
948 306 119 406	9	970 270 200 306	-	940 270 200 300 4 300 5 000		9 940 1 270 200 300			940 270 200 300 300		300	9	270 200 300			300		9 944		. 1	270 200 300		9 94 1 27 20 30	0	9	270 200 300			970 635 100 150
773 W6	. 2	866		5 000		5 000 8 500	. 7	5	500		5 000 5 000	5	500 000 500		1	500 900 500	2	500 1 000 8 500			500 000 500	-	50 1°00 8 50	0		500			-
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536	39	突	K			2 700		.6	805	4	700	1,2	700	0.	36	005	3	700		36		3	2 70 8 08	5	35	085		n	350 467
615 617 909	3 4 3	050 140 143 876		1 137	. 4	1 697	. "		676 623		2 050 1 656 615	,	636		1	975 995 992		1 950 1 570 505			900 535 570		1 51 56	5		495 555			277
250 · 124 · 1505 · 140 · 1505 · 160 · 153 · 160	2 2 19 39 30	2:8 167 196 200 660 009 160 169 071	2	232 125 130 669 140 053 140 053 053	- 1	227 122 120 673 5 869 51 751 58 160 89 911 15 206		15	221, 120 145 692 625 710 160 870 290 717*		222 119 110 681, 5 756 1 641 8 160 9 801 5 319	5 47 38 85 Le	700		5は芳年55	211, 115 158 665 75, 160 575 1733	14 39 80 57 S	210 113 156 676 5 351 5 160 1 511 3 605 106		53	205 110 152 655 131 216 160 376 744 267	8 5	200 100 150 670 5 080 3 170 8 161 1 331 3 760 6 631	9	53 36 53	200 107 11,8 666 021 106 100 266 854 081		19 39	110 090 239 721
26 14 100	1	071 .61\$ 078	6	351.		12 305 1 479 58 990 3.39% 80 199		58	1431 344 718	5	370	54.	799° 751		57	795° 069 286 080°	5	364	•	10	79° 556 858 993°		2.70 2.70 2.23		45	391 382 613 767		16	193 082 084 084

# PACE OF ESTIMATE COMPANY 1925-925

	1986	1927 1	928	1929	1930	1931	1932	1933 1934	1935 1936	1937	1938
Traffic Statistics:  Vehicular Units - Carquines - Amticeh Total  Passengers & Podostriess - Carquines - Amticeh Total  Total		108 430 1 844 515 1 3 1 934 334 2 9	63 136 17 533 1 16 539 3 69 090	198 940 161 041 180 609	199 840 1 563 428 1	191 050 1 507 248 1 3 209 219 2 112 944	148 002 258 003 1 725 422 2 319 780	083 604 1 099 140 121 099 131 652 144 663 1 191 092 555 372 2 673 216 246 516 275 222 801 888 2 946 140	1 159 340 1 468 1 126 659 146 1 126 659 1 644 5 3 997 5 261 006 296 1 3 261 467 4 294 1	865 113 110 917 1 863 878 995 4 174 000 136 289 100	1 596 00 150 00 1 746 00 4 150 00 303 00 4 163 00
Average For The Tear - Carquines Antioch Total		7 106 357° 7 3 1 645 596 1 7 6 751 925 9 0	09 189 1	716 422	1 720 602 1	1 728 619 1	736 746 1	950 995 7 946 464 737 540 1 737 532 688 535 9 683 996	7 946 068 7 947 1 1 737 599 1 738 1 9 683 667 9 685		7 9kg 53 1 739 35 9 668 69
Operating Revenues:  - Ourgaines - Autiesh Total	3 986 86 946 92 334	94 966 1	86 807 · 1 35 908 22 715 1	166 716.	1 203 322 1 165 728 1 369 050 1	157 879	122 050	99 556 107 913	1 068 609 1 314 107 585 126 1 176 194 1 1441	911 125 240	1 140 65 135 12 1 575 77
Direct Operating Expenses: - Carquines - detices Total	57 961 37 961	52 161	23 164 58 599 81 763	193 989 55 018 210 007	21.7 (13 51, 321, 21.7 (13,	201, 361 52 802 257 163	LO 847	181 030 166 176 16 112 13 301, 227 172 209 130	153 953 166 1 43 579 36 1 197 532 203	433 39 329	175 34 45 88 221 23
Constal Operating Expenses: Carpaines & Antioch Total Direct & General Expenses	61 961 24 000		81 991 63 754	90 659 339 666	69 153 316 566	75. 594 332 757	59 799 301 561	67 631 54 599 295 103 264 079	122 333 69 319 865 272		69 84 291 09
Inertisation Of Investment	33 215	164 117. 2	26 096	231 367	238 862	2hl 890	SI2 PR	21,5 301, 21,5 105	215 068 214	969 <b>21.1</b> - 887	. 21d 88
Total Expenses Flus Amortization	95 196	371 339 5	89 850	571 033	555 WB	577 647	553 028	540 LC7 509 184	54 933 517	817 620 064	535 96
let Income Before Income Taxes	2 862+	363 522 5	32 865	681 Obo	813 602	738 749	552 142	183 500 564 987	611 261 923	L13 1 058 :00	1 039 79
let Inome fax - Federal - State (Franchise fax)  Bet Inome After Inome Cames	2 155	5 64.7 357 875 5	32 865	681 Olyo	9 1470 801, 132	30 774 707 975	14 295 537 847	9 789 1 057 173 711 563 930	10 235 13 661 026 909		92 17 22 37 925 21
hturn - On linto lines - In lineses of 10% thro 1934.) 9% in 1935 & 6% for 1936-48)	0.3450 159 6110	6.13%	5.87% 574 584	7.35% 245 038°	8.47% 145 726	7.32. 259 563		14.89% 5.82% 1.85 11.30 11.01 1470-	270 50km 13k i		9.5° 150 13
A - Accumulated Rosess Bottom	159 611•	380 832° 7	755 14150	000 1530	1 116 1790	1 405 741. 1	837 050 2	332 193° 2 736 663°	3 007 167 0 2 872	313° 2 655 538°	2 505 la

- For the 7 months Period of Operation - Red Figure

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1.1		19	27	(9"	. 1	1935			193	2		194	2		194	1		194	2	3	194	1	111	194			1916		-	194	-		19	1	. 1	94	1
	53.5	1 72 11, 1 86 1 17 20 1 76	8 BT	78	1	150 146 150 303	000 000 000 000 000	1	150	000	1	150 002 295 303		1	150 832 375 303	800 000 000	1	150 866 463 303	000	14	150 897 543 503	200 200 000	1	150		14	150 958 703 303	000	14	150 989 783 303	000	2	150 020 863 303	000	7 29 56 15	3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3	000 000 000
	66	7 94 1 73 9 68	9 35	57 58	7 9	739	537 358 895	7 1 9	919		719	739	537 356 895	1	739	537 358 895	7 1 9	949	537 350 895	719	949 1799 6680	557 358 895	7 1 9	949 779 668	531 358 695	7 1 9	949 739 666	537 530 695	7 1 9	949 739 688	537 358 895	7 1 9	940 779 688	358	7 94 1 73 9 68	9 3	158
	m	1 55	5 2	10	1	135	653 120 773		135	783 120 903		135	913 120 033		135	956 120 676		135	712 120 832		135	120		135			135			135	264 120 404		135	927 120 047	6	7 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5	560
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#### AMERICAN TOLL BRIDGE COMPANY

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Furniture and Equipment totals for years prior to 1937 are based on the report referred to and details in Haskins & Sells audit refigure being as per Mr. Mitchell's report.

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[fol. 759] Mr. Thelen: As the title indicates, I take it that this is an earning exhibit and on the basis of the present tolls, covering the period of 1926 to 1948, is that right?

A. That is correct.

Q. Will you please explain it in your own way, Mr. Ready!

A. In this exhibit I would like to start from the last table first in order to give the foundation for the capital that has been used in determining the earnings of the Company. After considering the estimated reasonable historical cost, as set forth in Exhibit 117, and also the possible modifications of the book cost which might be made, including the addition of interest during construction and the possibility that-probability that the Dunn payment should be charged to cost of money rather than overhead-I came to the conclusion that the lowest figure that reasonably could be applied to the property would be the book costs as they stood on the books. It is true that some items might be questioned, but that on the other hand, the erroneous inclusion of interest during construction on the books, and only the interest and amortization of bond discount on the bonds, instead of the interest on the entire capital, plus the possibility of additions on account of the franchise of the Rodeo-Vallejo Ferry, that those factors would more than offset any possible modification. And also, in view of the fact that the books could be used to determine the capital throughout the entire period without making numerous adjustments, I made this study on the basis of the book costs of the Carquinez and Antioch Bridges, as distinguished

from the reasonable historical cost or any other item.

[fol. 760] In this Table 7 we start out with the lands which I testified to in Exhibit 117 as applicable to the Carquinez Bridge and the added lands in 1936 and 1937 for the Antioch Bridge. Then follows the allocation of furniture and equipment year by year between the two bridges. Then is given the total cost of the Carquinez Bridge, exclusive of lands and furniture and fixtures, which in 1927 ties in with Mr. Coleman's report and also with the other exhibits, that is, \$7,863,451.17. Then there is set up the Antioch Bridge as determined largely from the reports of the Company to the Securities Exchange Commission, that is to say, the net additions and betterments, with the capital by years to tie in with the figure as of 1937. Then under the heading

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"Carquinez Bridge open to traffic May 21, 1927," and under the main heading "Recapitulation, and derivation of average for year", we show the average capital by years from 1927 to 1937 for the Carquinez Bridge and follow with the average capital for the Antioch Bridge. The average capital for the last 7 months of 1927 for the Carquinez Bridge was \$7,106,337, compared with the capital of 1937 of \$7,949, 537. The Antioch Bridge, similarly, is shown for 1926 at \$1,542,941, compared with \$1,739,358 for 1937. That gives the capital by years for the Carquinez and Antioch Bridges from the date of opening to 1937. Then for 1938 to the end of the period the capital has been taken as the same that it was for December 31, 1937.

I would next refer to the detailed table No. 4 which will later be summarized in Table No. 1. This table is pretty heavy in figures. I realize, and maybe a little bit difficult [fol. 761] to follow. This sets forth the estimated earnings, and actual earnings and estimated earnings of the Carquinez Bridge of the American Toll Bridge Company from 1926 to 1948. Under item 1 is set forth the statistics as to the number of vehicles crossing the bridge and the number. of passengers or pedestrians, as determined from the ectual records and indicated in the preceding exhibit. Item 2 is a rate base which has been taken from the table I just referred to, Table 7, both as to the end of the year and the average for the year. Item 3 shows the operating revenues for the period from 1926 to 1937 as reported, and the estimated revenues for the remainder of the period. Under the item of "Rent and miscellaneous revenue" have been included the rents from the Carquinez Inn, from the Miller house and also the rents, amortization of prepaid rents, for operation of pipes and other facilities across the bridge. The miscellaneous interest and dividend earnings have not been included, as not representing an operating revenue of the bridge but dividends and interest from other sources. The operating expenses are next shown. Those were actually reported for the years 1927 to 1937, with some estimates for the year 1937 owing to the fact the books had not been closed at the time we prepared the exhibit. plies to all the items there set forth. Taxes, real estate, county franchise and gross revenue taxes are included under the direct expenses. Then under item 5 is the allocation of the general operating expenses. From 1927 to 1937

they are as actually allocated by the Company, as we determined from the books. Then is shown the total under item [fol. 762] 6, total direct and general expenses. Item 7 is the amortization of investment and is the annuity on a 6 per cent sinking fund basis applied to the total capital of the bridge as indicated under item No. 2. That is, we comrated the annuity which, at 6 per cent, would amortize the investment throughout the life. You will notice it is about on an average \$206,000 or \$207,000. It differs from the amount shown in the Company's books, in that, those amounts show the interest upon the accrued depreciation but, as this is based upon a return upon the investment new, on the basis of rates indicated by the exhibit on cost of money and fair rate of return, the annuity only is included. Following that is the item of net income before income tax; and then the deduction of income tax as computed the total income taxes for the Company applied to the Carquinez Bridge for the years 1927 to 1937. Then it shows net income and the rate of return upon the rate base. showing a return in 1927 of 8.62, increasing to 91/2 in 1930, dropping to 5.86 in 1933 and increasing to 12.12 in 1937. At the bottom of the page, line 13, is shown the earnings in excess of 10 per cent return for the period through 1934. 9 per cent in 1935 and 8 per cent for 1936 to 1948. And in line 14 is shown the accumulation of that excess without interest. That shows at the end of 1937 they had failed to earn a return of 10 per cent, 9 and 8 per cent by \$1,039,472. Referring now to the portion which deals with 1938 to 1948

Mr. Thelen: Pardon me, before you get to that, you referred to line 13 as showing figures in excess of a 10 per cent return. To a considerable extent those figures show [fol. 763] a deficit below a 10 per cent return, do they not?

A. All of those figures marked with an asterisk represent a deficit below 10 per cent return up to 1935, a deficit below per cent return in 1935 and then it shows a profit in excess of 8 per cent return in 1936 and 1937. In my exhibit, in liscussing rate of return, you will remember that rate of return, if based on 1.15 times the cost of money, would average for 1936 to 1947 8.33, as compared with the cost of—rate of 8 per cent I have set forth here. As a matter of fact, if we take it on a strict application of the 1.15 per cent return et forth in that preceding exhibit, the return for 1935 would

have been 9.47 and 1936 would have been 9.33 instead of 8 per cent.

For the period 1938 to 1947 I have stime and the operating expenses for the Carquinez Bridge, direct expenses based upon an analysis of expenses for 1936 and 1937, and the main changes which I wish to call attention to gre in the item of repairs, where I have included for 1938 to 1942 \$10,000 a year for extra maintenance and repair work which Mr. Gerwick testified to, and thereafter included an item of \$3,000 for the inspection and maintenance of the bridge erclusive of painting—that is, the \$10,000 is included in the total item of \$11.400 showing up under "repairs". Other than that, the direct operating expenses are in general fairly comparable to those in the years 1935, 1936 and 1937; in fact, if anything, slightly lower. When we came to general operating expenses we estimated those for the American Toll Bridge Company as a whole and then for the years 1938 and 1947 allocated those total expenses on a [fol. 764] gross revenue basis between the two bridges. rather than the basis heretofore used. I appreciate that that is an arbitrary basis in one sense, but we came to the conclusion it was more to the Antioch Bridge than the outof-pocket cost of managing the Antioch Bridge, but it was one basis that is very often used particularly where one of the properties is earning a low return. The basis heretofore has been from 10 to 111/2 per cent, I believe, or more: and this would, of course, result in somewhat less than 10 per cent of the general expenses chargeable to the Antioch The amount shown here is a proportion of the total general expense which has been allocated to the Carquinez Bridge. Now, certain items do not repeat them-For instance, the item of employes' retirement, which totaled for 1937 \$30,000, is not a recurring item. The item of fees for attorneys, directors, and so forth, has been materially reduced below what was done for either 1935 or 1937, as it is not contemplated that the conditions would call for a repetition of those expenditures. The item of miscellaneous, totaling \$16.767 for 1937 includes all of the expenses that the Company has incurred up to December 31st in connection with the present rate proceeding, together with other expenses which have been charged to that item. In the succeeding 5 years there has been included \$4,000 a year as an estimated amortization of any further

emenses in connection with the rate proceeding, estimated papproximate \$20,000. The item of taxes and license fees peeds explanation in this respect, that in that item during 1935, 1936 and 1937 was included the State franchise tax [fal. 765] on the net revenue of the Company. It is, however directly connected with the net revenue of the Company and, therefore, can not be estimated except by putting it over with the Federal income tax. So, for the succeeding years that item has been eliminated from that particular account. The balance of the item is made up largely of the Social Security taxes, unemployment taxes, capital stock tax and similar items, and on the basis of the payroll we estimated those taxes from year to year, applying the tax rates which were applicable from year to year, there being an increase in certain of those rates during the remaining period, and that accounts for the increase in that item. The amortization of investment I have already explained. income tax on this particular table has been based upon computing both the State and Federal tax on the income that would result from this gross revenue, applied to the Carquinez Bridge. The situation is somewhat this way. that in allocating the costs, capital costs, of bond issue between the two bridges we find somewhat less bond interest and amortization charged to the Carquinez Bridge than to the total. We, therefore, computed in detail, on the basis of the present State and Federal income tax rates and laws. the Federal income tax applicable to the Carquinez Bridge, and the State franchise tax applicable to the Carquinez Bridge, for the remaining period of the franchise. And I want to call particular attention to the steady increase in the Federal income tax and in the State tax and the fact that in 1948 the income tax is in excess of the gross revenue [fol. 766] of the bridge. That is due to the fact that the Company has accrued its taxes on the payment basis, rather than accrual basis, and the income tax of 1937 is the income tax on 1936 revenue, so the income tax of 1948 is the income tax on 1947 revenue plus, in this case, that I added in a few thousand dollars of income tax on the 1948 revenue because the Company would presumably be closed out and would have to pay it. So in 1948 the income tax, if the present rates are continued, would be \$226,341, and the State tax would be \$43,221. The reason for that steady increase in income tax is, of course, both the fact that the Company's

income is estimated to increase, as well as the fact that as the years progress, the deductions allowed in connection with the income tax computations materially decrease. That is, the deductions that are particularly changing are the interest upon the bords and the amortization of bond discount and expense. Inder the provisions the amount of amortization and bong discount and expense is heavy, particularly heavy in 1939-1940, and entirely eliminated after 1945, and the interest and amortization of bond discount and expense resulting in a fairly large deduction up to the present time and then finally no deduction after 1945. Now, that throws the income into the surtax and excess profits tax basis that otherwise would not come in. It throws also the normal income into the 15 per cent bracket. I went through this four times in detail, and if anybody wants to know about it I will try to advise them. I think you will firm it quite interesting.

[fol. 767] Q. Isn't the reason for the increasing Federal income taxes largely due to the fact that items, which under the law may be deducted in computing the income tax, grow less year by year, particularly that item of interest on

bonds and the amortization of discount?

A. That is the major item that causes it, plus the fact that in any concern that has a limited franchise and makes ittle in the first few years, if it makes up what it doesn't take in the first few years, then it has to pay an excess profits tax on what it makes up in the last few years.

I think, as to the summary figures here we better wait until we look at the first three tables in this exhibit. Table 5 is a comparable table for the Antioch Bridge, and without going into detail except to point out that certain items have been increased to take care of the special maintenance of the bridge as testified to by Mr. Gerwick for the period 1938 to 1942, I feel in both of these cases that the practice of amortizing that deferred maintenance over a period of 5 years was fairer than to attempt to charge it into one particular year; therefore, I have allocated it over that period

The Witness: The sixth table is a showing for the composite of the two bridges, the American Toll Bridge Company as a whole. The data for the two bridges are added together as to traffic, revenue, capital and expenses. The income tax, both State and Federal, however, has been computed on the composite earnings of the two bridges. I

failed to point out in Table 5 that, flue to the fact the Antioch [fol. 768] Bridge was earning a very low return, it would in effect imply a negative income tax for several years; that is, it is possibly like eleemosynary institutions, you can deduct your losses or gifts to the poor bridge. And by allocating bond interest, bond cost, interest, sinking fund and retirements you determine a higher income tax to the Carquinez Bridge than the income tax to the total Company, so that due to that fact, the failure to earn of the Antioch Bridge, it reduces the income tax that otherwise would be applicable to the Company as a whole. In table 6 the income tax is computed for the entire company—

Mr. Rowell: Pardon me, I assume then, Mr. Ready, you are supposing the continuance of a consolidated return

over the entire period?

A. Oh, yes; only in allocating between the two does this affect the curve. Mr. Hunter's exhibit followed much the same basis, in that they computed the income tax of the Carquinez Bridge separate from the Antioch. If you do that you get a higher income tax than you get for the total Company, and that is the same basis followed here.

Mr. Thelen: As I understand it, you have done both: You have taken the Carquinez and the Antioch Bridge separately, first, and then you have put them together in a con-

solidated exhibit?

A. No, I have computed it on the Carquinez Bridge and then on the Company as a whole, and the difference between the Carquinez Bridge income tax and the Company income tax is the remaining income tax applicable to the Antioch Bridge. Now, that results in a credit against the Carquinez Bridge income tax.

[fol. 769] Q. Your figures do show the situation separately as to the Carquinez Bridge, but in another place you show

the situation for the Company as a whole?

A. That is correct. Table 6 shows it in detail.

Mr. Thelen: Have you prepared an exhibit entitled "Estimated increase in automobile traffic which would result from reduction of tolls. Suggested by J. G. Hunter"?

A. Yes, I have.

Mr. Thelen: We ask that that exhibit be introduced as No. 133.

Commissioner Riley: Exhibit 133, so noted.

Mr. Thelen: As I understand it, Mr. Ready, in the preceding exhibit you estimated earnings based on present tolls?

A. That is correct.

Q. And as I understand it, you are now looking ahead to the subject of the possible effect of decrease in tolls in stimulating other volume of traffic?

A. That is correct.

Q. And this particular exhibit has been prepared in connection with that matter, has it not?

A. Yes.

Q. Now, if you will please explain the exhibit in your own

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way, Mr. Ready.

A Of course, the object of this analysis in the ultimate is to make possible the estimating of the revenue that the bridge might obtain if the rates were reduced to those suggested by Mr. Hunter, that is, 50 cents per vehicle, including 5 passengers, or a driver and 4 passengers, the ultimate object being, of course, to determine the revenue which might be obtained were these rates established.

[fol, 770] My conclusion is that, all factors considered, the stimulation of traffic; assuming a 50-cent toll, should not

exceed 11 per cent.

Commissioner Riley: You say the study is made exclusively on automobiles. Nevertheless, in your calculations you have taken in all types of vehicles over the bridge, have you not?

A. As to revenue, we have included all the revenue from all classes of service, but in the question of stimulation of traffic we have dealt with automobiles only and nothing for trucks and busses. This entire distribution of vehicles is based on automobiles and not automobiles and busses and trucks.

Mr. Thelen: That is because Mr. Hunter's proposal was limited to a reduction in passenger automobiles, was it not?

A. Yes. The fares over the bridge, as he pointed out, for trucks and, I believe, for busses, is equal or lower than they are across the Bay Bridge at the present time.

Q. Now, Mr. Ready, having finally gotten a figure which represents your judgment as to the stimulation or increase in automobile passenger traffic, which would follow if the cut suggested by Mr. Hunter were made effective, I assume that you are now in a position to prepare an exhibit show-

g, under Mr. Flunter's proposal, assumed traffic, assumed wenue, operating expenses and net income if his proposalers worked out?

A. That is correct.

Q. And is that a subject on which you have prepared your exhibit?

A. Yes.

Mr. Thelen: If the Commission pleases, we now ask that ol. 771] an exhibit consisting of four pages be introduced at marked Exhibit No. 134.

(Here follow four photolithographs, Exhibit No. 134, side folios 772 to 775)

	•	1936	1937
(1)	Ventoular Units:		
,	Present Rates, 100%	1 468 052	1 720 78
	Proposed Rates 108.87%	-	-
(2)	Rate Base (Historical Cost):		-
	Average Capital	7 847 411	7 949 53
(3)	Operating Revenues:		
	Telle 6 \$0.61607/Vehicle, after 1937	1 306 191	1 544 69
1	Romts and Miscellaneous	8 128	8 24
	Total	1 314 319	1 522 93
(4)	Direct Operating Expenses:		2
	Operation, Maintenance, etc.	140 575	135 08
	Gross Rovenuo Tax (2%)	26 125	31 11
	Total	166 700	
(5)	General Expenses	61 625	149 97
	Total Diroct & General Expenses	228 325	316 16
	Amortisation of Invostment	506 809	
	Total Maponess Plus Amortization	435 134	522 89
	Not Income Before Income Taxes	978 · 185	1 030 039
(10)	Inome Taxou:	/	11 00
	Foderal Incomo Tax	13 689	66 22
	State Franchise Tax	- /22	77.00
	Total	13 689	66 22
	Total amp. Incl. Amortis. & Income Taxes	148 823	589 11
	Not Income After Income Taxes	865 496	963 81
(13)	Botanni	20 000	10.10
	(a) On Rate Base	10.89%	
,	(b) In Excess of 8%	229 703	327 85
4.7	(c) Accumulated Excess Return	1 367 325*	1 029 47

o -- Composite ratio based on stimulation of 11% in "automobi

### COMPANY EXHIBIT NO. 134

#### ESTIMATED FUTURE

TRAFFIC, RATE BASE, OPERATING REVENUES, EXPENSES & RETURN
Under Rates Proposed By J. G. Hunter, 1938-1948

CARQUINEZ BRIDGE

AMERICAN TOLL BRIDGE COMPANY

1936	1937	1938	1939	1940	1941	1942	1943 19	1945	1946	1947	1948
1 468 052	1 720 786	1 596 000 1 737 565	1 624 000 1 768 049	1 652 000 1 1 798 532 1	682 800 832 064	1 716 400 1 868 645		78 000 1 808 800 85 709 1 969 24		870 400 035 304	218 300 237 633
7 847 411	7 900 537	7 940 537	7 949 537	7 949 537 7	949 537	7 949 537	7 949 537 7 94	e 537 7 9Le 537	7 949 537 7	949 537 7	7 949 537
1 306 191 8 128	1 544 691 8 242 1 522 934	8 243	1 078 634 8 243 1 086 877	1 097 230 1 8 243 1 105 473 1	117 687 8 213 125 930	1 140 004 8 243 1 148 247	8 243	80 918 1 201 379 8 243 8 243 99 161 1 209 648	8 243	242 288 8 243 250 531	114 991 1 375 146 366
1 314 319 140 575	135 084		146 700	146 700	146 700	146 700		38 300 138 300	•	138 300	9 850
26 125 166 700	31 114 166 198	21 201	21 573 158 273	21 945	22 354	22 800 169 500	23 209 8	23 618 24 026 51 918 162 326	St 721	24 846 163 146	2 900 12 750
61 625	119 970	63 852	63 991	64, 365 233 010	233 488	64 575 234 675	62 186	2 254 62 38	62 761	62 829 225 975	25 363
228 325 206 809	316 168 206 727	206 727	206 727 138 991	206 727 139 737	206 727	206 721 140 802	206 727 20	6 727 236 72 20 899 431 44	206 727	206 727	38 113 34 454 72 567
978 · 185	522 895 1 030 039		647 886	665 736	685 715			8 262 778 171		817 829	73 799
13 689	66 223	108 511 24 726	45 073 9 236		50 427 11 858	54 899 13 402		73 340 80 596 18 594 20 786		97 130 / 24 501	115 615 26 120
13 689 148 823	66 223 589 118	133 237 571 717	54 309 193 300	50 600 LOO 337	502 500	68 301 509 103	77 L/60 9	22 833 532 820	548 192	121 631 554 333	141 735 214 302 67 936
865 196	963 816		593 577	615 136	623 430			66 328 676 79	/	696 198	4
10.89% 229 703 1 367 325	327 853	. 139 401*		20 827*	7.84% 12 533 1 254 619	8.0ks 3 181 1 251 438	8.31% 24 359 1 226 579* 1 19	8.53% 8.535 50 365 40 835 66 2140 1 155 375	45 920	8.76%: 60 235 049 224* 1	3.46%* 173 930* 1 223 154*

TRAFFIC, RATE RASE, OPERATING REVENUES, EXPRESES & RETURN
Under Retes Proposed By J.G. Hunter, 1938-1948

ANTIOCH BRIDGE

AMERICAN TOLL BRIDGE COMPANY

		** . ** .		AMERICAN IV	THE DESCRIPTION OF	CHE CHE	
	1936	1937	1938	1939	1940	1941	1942
(1) Vehicular Units:	1 2 2 2 2 2 2		1				
Present Rates 100.00%	146 865	143 110	150 000	150 000	150 000	150 000	150 000
Proposed Rates 108.87%			163 305	163 305	163 305	163 305	163.305
(2) Rate Base (Historical Cost):		1 1					
Average Capital	1 738 466	1 739 358	1 739 358	1 739-358	1 739 358	1 739 358	1 739 358 1
3) Operating Revenues:	- 1,50 400	- 133 330	- 137 33-	- 133-330	- 137 330	- 137 330	- 100 000
Tolls 0 0.61007/Vehicle, after 1937	126 791	125 120	99 627	99 627	99 627	99 627	99 627
	120	120	120	120	120	120	120
Rents and Miscellaneous						99 747	99 747
Total	126 911	125 240	99 747	99 747	99 747	77 141	77 141
4) Direct Operating Expenses: 18	77 000	÷/ 000	12 200	1	. 17 100	1.2 300	70 705
Operation, Maintenance, etc.	33 897	36 827	43 185	43 185	43 185	43 185	39 385
Gross Revenue Tax (2%)	2 536	2 502	1 993	1 993	1 993	1 993	1 993
Total	36 433	39 329	45 178	45 178	45 178	45 178	41 378
5) General Expenses	8 090	19 680	6 008	5 869	5 825	5 756	5 615
6) Total Direct & General Expenses	4 523	59 009	51 186	51 047	51 003	50 934	46 993
7) Amortization of Investment	38 160	38 160	. 38 160	38 160	38 160	38 160	38 160
8) Total Expenses Plus Amortization	82 683	97 169	89 346	89 207	89 163	89 094	85 153
9) Not Income Bofore Income Taxos	44 228	28 071	- 10 401	10 540	10 584	10 653	14 594
0) Incomo Taxes:							
Foderal Income Tax			16 338+	19 334*	16 666	17 174*	14 650*
State Franchise Tax	/		2 351*				
Total	- 1		18 689*	22 279	19 748		
1) Total Exp. Incl. Amortization & Income Taxes	82 683	97 169	70 657	66 928	69 415	· 69 III	68 021
2) Net Income After Income Taxes	44 228	28 071	29 090	32 819	30 332	30 606	
3) Return:	44 220		-, -,-	,,	, ,,,,	, ,,,	41.00
(a) On Bate Base	2.51%	1.61%	1.67%	1.89%	1.716	1:76%	1.82%
	94 815+						
(b) In Excess of 8%							
(c) Accumulated Excess Return	1 504 988*	1 616 066*	1 726 125*	1 832 455	1 941 272	5 mb.012	2 157 238+ 2

<sup>-</sup> Composite ratio based on stimulation of 11% in "automobile" traffic.

<sup>-</sup> Red Figure

# tor, 1938-1948

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٦.					
			-	-	-

1948
(To July 5)
0 75 000
5 81 652
8 1 739 358
7 49 813
0 60
7 49.873
5 10 117
3 996
8 11 113
1 8 682
9 19 795
0 19 090
9 38 885
2 10 988
9* 4 546*
8* 1 061*
7. 5 607.
2 33 278
5 16 595
7. 1.91%
4 . 52 979
9* 2 773 808*
25

ESTIMATED FUTURE

Under Rates Proposed By J. G. Hunter, 1936-1948

Carquines Bridge and Antioch Bridge

AMERICAN TOLL BRIDGE COMPANY

4										-												
	and the second of the second o		1936	5		1937	7.		1938	3 .		193	)		194	0	. 9	1941		- 1	1942	
(1)	Vehicular Units:	٠																	4			
		\$1	614	917	1	863	878	1	746	000	1	774	000	1	802	000	1	832	800	1	866	
	Proposed Rates 108.87%	٠,	1		.:	1	*.	1	900	870	1	931	354	1	961	837	1	995	369		031	
(2)	Rate Base (Historical Cost):																	1		:		
	Average Capital	9	685	877	9	688	895	9	688	895	9	688	895	9	688	895	9	688	895	91	688	
(3)	Operating Revenues:								. 1													
	Tolls @ \$0.61007/Vehicle, after 1937	1	432	982	1	669	811	1	159	663	1	178	261	1	196	857	1	217	314	1	239	
	Rents and Miscellaneous		. 8	248	1,	8	363		. 8	363		8	363		8	363		. 8	363	_	8	
,	Total	1	441	230	1	678	174	1	168	023	1	186	651	1	205	220	1	225	677°	1	247	
(4)	Direct Operating Expenses:			14.	٠.		1		٠.		* *		4		. 0							
	Operation, Maintenance, Etc.		174	472		171	911		189	885					189	885		189	885	3	186	
*	Gross Revenue Tax (2%)	1	28	661		33	616	*	23	194		23	566		23	938		24	347	- :	24	
	Total		203	133		205	521		213	079			451	-		823			232	- 1	210	
(5)	General Expenses		69	715		169	650		69	860		69	860		70	190		70	190	-,7 -	70	
(6)	Total Direct & General Expenses		272	848		375			282	939			311		284	013		284	1422		281	
(7)	Armortisation of Investment		श्री	969		अर्ग	887		या	887	1	अर्ग	887	N/A	अम	887		श्रम	887	.1	314	1
(8)	Total Expenses Plus Amortisation		517	817		620	064		527	886		528	198			900		529		1	525 722	į
(9)	Net Income Before Income Taxes	1	923	413	1	058	110	- ,	640	200		658	426		676	320		696	368		722	
(10)	Incomo Taxos:					-		. 1					*					,	*			
	Federal Income Tax		13	609		66	223	1	92	173		25	739		24	113		33	253	5	40	
	Stato Franchise Tax		2					-	22	375		6	291		6	739	4	.9	079		10	
	Total			689			223			548			030		30	852		42	332	4	517	١
11)	Total Exp. Incl. Amortization & Income Taxes	-	531	506	1		267		642	374		560	228	4	559	752		571	641		577	
12)	Not Income After Income Taxos		909	724		991	887-	1	525	652		626	396		645	468		654	036	: .1	670	
(13)	Roturn:	7								1.												
	(a) On Rato Baso		9	39%			24%		5.	43%			46%		6	.66%		6.	75%		6	
	(b) In Excoss of 8%		134	854		216	775			460			716*			644			076*	- 2	104	
./	(c) Accumulated Excess Roturn	2	872	313*	2	655	538*	5	904	998*	3	053	714*	3	183	358*	3	304	434*	31	408	
4 2											* 45			*		-						

Composito ratio based on stimulation of 11% in "automobile" traffic.

Rod Figuro

es, expenses à return ter, 1938-1948 à Bridge COMPANY

1941		7							-		-												
274			1948	1	1	1943	3		194	1		1945	,		194			194	7	P	194	3 .	
		1	866	400	1	897	200	1	928	000	1	958	800	1	989	600	2	020	400				
995	509	2	Où	950	2	005	ПОБ	2	לבט	OTA		136	240	-	100	010	-	777			217	200	
688	895	9	688	895	9	688	895	9	688	895	9	688	895	9	688	895	9	688	895	9	688	895	
		1			1						1			1			1				-		
8	363	1,5									_			_			-			_			
225	677	1	247	994	1	268	क्य	1	268	908	1	309	365	1	329	822	1	350	276	_	196	239	*
189	885		186	085		173	685	*	173	685		173	685		173	685		173	685	1	19		
24	347	31.0			*							26	021		26	430		26	839	- 7	3		
214	232	NA.			. 1	198	887	10				199	706										*
			70	190	10	- 57	520	.:	67	520		67	520	. *		- The same of the	7						
284	1.22		231	068						-			-		-	-	1 4			,	57	908	
श्रम	687	7		and the same of													-		_		_53	74	
529	309		565	955	1	511	294		-	-		-	-					-	The Personal Property lies	-			*
696	368		722	059		757	157		777	205	-	797	252		816	970		837	017		3/1	787	
33	253		40	210		50	857		64	596		74	540										
-	-		10	920		13	871		17	000		19	487				-						
42	332					64	728									-	-						٨,
571	643		517	124				١.	593	301		-		1.	Georgia and Allendaria	The second second second		and the same of					
654	036		670	-970		692	1429		695	607	:/	703	225		705	529		717	393		.51	341	
6	-75%		6	.92%		7	.15%		7	.18%		. 7					1						
121	076*											71											
304	434	3	408	676*	3	101	359*	3	570	964	3	6/15	751	3	712	334	3	770	053*	3	99,6	962	ě.
	995 688 217 8 21 70 21 21 20 69 33 9 14 571 65 6121	995 369 688 895 217 314 8 363 225 677 189 885 24 347 214 232 70 190 284 322 244 887 529 309 696 368 33 253 9 079 42 332 571 641 654 036 6.75% 121 076	995 369 2 688 895 9 217 314 1 8 363 225 677 1 189 885 24 347 214 232 70 190 284 322 214 687 529 309 696 368 33 253 9 079 42 332 571 641 654 036	995 369 2 031 688 895 9 688 217 314 1 239 8 363 8 225 677 1 247 189 885 186 24 347 24 214 232 210 70 190 70 284 322 281 244 687 224 529 309 525 696 368 722 33 253 40 9 079 10 42 332 51 571 641 577 654 036 670 6.75% 6	995 369 2 031 950 688 895 9 688 895 217 314 1 239 631 8 363 8 363 225 677 1 247 994 189 885 186 085 24 347 24 793 214 232 210 878 70 190 70 190 284 322 281 068 244 687 224 887 529 309 525 955 696 368 722 039 33 253 40 249 9 079 10 920 42 332 51 169 571 641 577 124 654 036 670 370 6.753 6.923 121 076* 104 242*	995 369 2 031 950 2 688 895 9 688 895 9 217 314 1 239 631 1 8 363 8 365 225 677 1 247 994 1 189 885 186 085 24 347 24 793 214 232 210 878 70 190 70 190 284 322 281 068 244 887 244 887 529 309 525 955 696 368 722 039 33 253 40 249 9 079 10 920 42 332 51 169 571 641 577 124 654 036 670 370 6.753 6.925 121 076* 104 242*	995 369 2 031 950 2 065 688 895 9 688 895 9 688 217 314 1 239 631 1 260 8 363 8 365 8 225 677 1 247 994 1 268 189 885 186 085 173 24 347 24 793 25 214 232 210 878 198 70 190 70 190 87 284 1,22 281 068 266 244 687 244 887 244 529 309 525 955 511 696 368 722 039 757 33 253 40 249 50 9 079 10 920 13 42 332 51 169 64 571 641 577 124 576 654 036 670 370 692 6.75% 6.92% 7 121 076* 104 242* 82	995 369 2 031 950 2 065 482 688 895 9 688 895 9 688 895 217 314 1 239 631 1 260 088 8 363 8 365 8 363 225 677 1 247 994 1 268 451  189 885 186 085 173 685 24 347 24 793 25 202 214 232 210 878 198 887 70 190 70 190 87 520 284 122 281 068 266 407 244 887 244 887 244 887 529 309 525 955 511 294 696 368 722 039 757 157  33 253 40 249 50 857 9 079 10 920 13 871 42 332 51 169 64 728 571 641 577 124 576 022 654 036 670 370 692 429	995 369 2 031 950 2 065 482 2 688 895 9 688 895 9 688 895 9 217 314 1 239 631 1 260 088 1 8 363 8 363 8 363 225 677 1 247 994 1 268 451 1  189 885 186 085 173 685 24 347 24 793 25 202 214 232 210 878 198 887 70 190 70 190 67 520 284 522 281 068 266 407 244 687 244 887 244 887 244 687 244 887 244 887 529 309 525 955 511 294 696 368 722 039 757 157  33 253 40 249 50 857 9 079 10 920 13 871 42 332 51 169 64 728 571 641 577 124 576 022 654 036 670 370 692 429	995 369 2 031 950 2 065 482 2 099 688 895 9 688 895 9 688 895 9 688 217 314 1 239 631 1 260 088 1 280 8 363 8 365 8 363 8 225 677 1 247 994 1 268 451 1 288  189 885 186 085 173 685 173 24 347 24 793 25 202 25 214 232 210 878 198 887 199 70 190 70 190 87 520 67 284 122 281 068 266 407 266 244 887 244 887 244 887 244 529 309 525 955 511 294 511 696 368 722 039 757 157 777  33 253 40 249 50 857 64 9 079 10 920 13 871 17 42 332 51 169 64 728 81 571 641 577 124 576 022 593 654 036 670 370 692 429 695	995 369 2 031 950 2 065 482 2 099 014 688 895 9 688 895 9 688 895 9 688 895 217 314 1 239 631 1 260 088 1 280 545 8 363 8 363 8 363 8 363 225 677 1 247 994 1 268 451 1 288 908  189 885 186 085 173 685 173 685 24 347 24 793 25 202 25 611 214 232 210 878 198 887 199 296 70 190 70 190 87 520 67 520 284 4.22 281 088 266 407 266 816 244 887 244 887 244 887 244 887 229 309 525 955 511 294 511 703 696 368 722 039 757 157 177 205  33 253 40 249 50 857 64 596 9 079 10 920 13 871 17 002 42 332 51 169 64 728 81 598 571 642 577 124 576 022 593 301 654 036 670 370 692 429 695 607	995 369 2 051 950 2 065 482 2 099 014 2 688 895 9 688 895 9 688 895 9 688 895 9 217 314 1 239 631 1 260 088 1 280 545 1 8 363 8 365 8 363 8 363 225 677 1 247 994 1 288 451 1 288 908 1  189 885 186 085 173 685 173 685 24 347 24 793 25 202 25 611 214 232 210 878 198 887 199 296 70 190 70 190 67 520 67 520 284 1.22 281 068 266 407 266 816 244 887 244 887 244 887 529 309 525 955 511 294 511 703 696 368 722 039 757 157 777 205  33 253 40 249 50 857 64 596 9 079 10 920 13 871 17 002 12 332 51 169 64 728 81 598 571 641 577 124 576 022 593 301 654 036 670 870 692 429 695 607	995 369 2 031 950 2 065 482 2 099 014 2 132 688 895 9 688 895 9 688 895 9 688 895 9 688 217 314 1 239 631 1 260 088 1 280 545 1 301 8 363 8 363 8 363 8 225 677 1 247 994 1 268 451 1 288 908 1 309  189 885 186 085 173 685 173 685 173 24 347 24 793 25 202 25 611 26 214 232 210 878 198 887 199 296 199 70 190 70 190 67 520 67 520 67 284 122 281 068 266 407 266 816 267 214 887 214 887 214 887 214 887 214 887 152 309 525 955 511 294 511 705 512 696 368 722 039 757 157 177 205 797  33 253 40 249 50 857 64 596 74 9 079 10 920 13 871 17 002 19 12 332 51 169 64 728 81 598 94 571 644 577 124 576 022 593 301 606 654 036 670 870 682 429 695 607 703	995 369 2 031 950 2 065 482 2 099 014 2 132 546 688 895 9 688 895 9 688 895 9 688 895 217 314 1 239 631 1 260 088 1 280 545 1 301 002 8 363 8 365 8 363 8 363 8 365 225 677 1 247 994 1 268 451 1 288 908 1 309 365  189 885 186 085 173 685 173 685 173 685 24 347 24 793 25 202 25 611 26 021 214 232 210 878 198 887 199 296 199 706 70 190 70 190 67 520 67 520 67 520 224 422 281 068 266 407 266 816 267 226 224 887 244 887 244 887 244 887 244 887 244 887 529 309 525 955 511 294 511 705 512 113 696 368 722 039 757 157 177 205 797 252  33 253 40 249 50 857 64 596 74 540 9 079 10 920 13 871 17 002 19 487 521 571 641 577 124 576 022 593 301 606 140 654 036 670 370 692 429 695 607 703 225 6.75% 6.92% 7.15% 7.18% 7.26% 121 076* 104 242* 82 663* 79 505* 71 86%	995 369 2 031 950 2 065 482 2 099 014 2 132 546 2 688 895 9 688 895 9 688 895 9 688 895 9 688 895 9 217 314 1 239 631 1 260 088 1 280 545 1 301 002 1 8 363 8 365 8 363 8 363 8 363 225 677 1 247 994 1 268 451 1 268 908 1 309 365 1 189 885 186 085 173 685 173 685 173 685 24 347 24 793 25 202 25 611 26 021 214 232 210 878 198 887 199 296 199 706 70 190 70 190 67 520 67 520 67 520 284 422 281 068 266 407 266 816 267 226 244 887 244 887 244 887 244 887 529 309 525 955 511 294 511 703 512 113 696 368 722 059 757 157 177 205 797 252  33 253 40 249 50 857 64 596 74 540 9 079 10 920 13 871 17 002 19 487 142 332 51 169 64 728 81 598 94 027 571 641 577 124 576 022 593 301 606 140 . 654 036 670 870 692 429 695 607 703 225 6.75% 6.92% 7.15% 7.18% 7.26% 71 88?*	995 369 2 031 950 2 065 482 2 099 014 2 132 546 2 166 688 895 9 688 895 9 688 895 9 688 895 9 688 895 9 688 217 314 1 239 631 1 260 088 1 280 545 1 301 002 1 321 8 363 8 365 8 365 8 365 8 365 8 365 8 225 677 1 247 994 1 268 451 1 288 908 1 309 365 1 329  189 885 186 085 173 685 173 685 173 685 173 685 173 24 347 24 793 25 202 25 611 26 021 26 214 232 210 878 198 887 199 296 199 706 200 70 190 70 190 67 520 67 520 67 520 67 224 527 224 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 244 887 245 887 246 816 267 226 267 696 368 722 039 757 157 777 205 797 252 816  33 253 40 249 50 857 64 596 74 540 89 9 079 10 920 13 871 17 002 19 487 22  42 332 51 169 64 728 81 578 94 027 111 571 641 577 124 576 022 593 301 606 140 624 654 036 670 870 692 429 695 607 703 225 705  6.75% 6.92% 7.15% 7.18% 7.26% 7	995 369 2 031 950 2 065 482 2 099 014 2 132 546 2 166 078 688 895 9 688 895 9 688 895 9 688 895 9 688 895 217 314, 1 239 631 1 260 088 1 280 545 1 301 002 1 321 459 8 363 8 363 8 363 8 363 8 363 8 363 225 677 1 247 994 1 268 451 1 288 908 1 309 365 1 329 822  189 885 186 085 173 685 173 685 173 685 173 685 24 347 24 793 25 202 25 611 26 021 26 430 214 232 210 878 198 887 199 296 199 706 200 115 70 190 70 190 67 520 67 520 67 520 67 850 224 687 244 887 244 887 244 887 244 887 244 887 225 696 368 722 039 757 157 177 205 797 252 816 970 33 253 40 249 50 857 64, 596 74 540 89 333 9 079 10 920 13 871 17 002 19 487 22 108 42 332 51 169 64 728 81 598 94 027 111 441 571 641 577 124 576 022 593 301 606 140 624 23 654 036 670 370 652 429 695 607 703 225 705 529 6.75% 6.92% 7.15% 7.18% 7.26% 7.26% 7.28% 121 076* 104 242* 82 663* 79 505* 71 887* 69 583*	995 369 2 031 950 2 065 482 2 099 014 2 132 546 2 166 078 2 688 895 9 688 895 9 688 895 9 688 895 9 688 895 9 688 895 9 217 314, 1 239 631 1 260 088 1 280 545 1 301 002 1 321 459 1 8 363 8 365 8 365 8 365 8 365 8 365 8 365 8 365 225 677 1 247 994 1 268 451 1 288 908 1 309 365 1 329 822 1 189 885 186 085 173 685 173 685 173 685 173 685 24 347 24 793 25 202 25 611 26 021 26 430 214 232 210 878 198 887 199 296 199 706 200 115 70 190 70 190 67 520 67 520 67 520 67 850 284 1.22 281 068 266 407 266 816 267 226 267 905 244 887 244 887 244 887 244 887 244 887 529 309 525 955 511 284 511 703 512 113 512 852 696 368 722 039 757 157 177 205 797 252 816 970 33 253 40 249 50 857 64 596 74 540 89 333 9 079 10 920 13 871 17 002 19 487 22 108 42 332 51 169 64 728 81 578 94 027 111 441 571 641 577 124 576 022 593 301 606 140 624 233 654 036 670 870 682 429 695 607 703 225 705 529 6.75% 6.92% 7.15% 7.18% 7.26% 7.28% 121 076* 104 242* 82 663* 79 505* 71 867* 69 583*	995 369 2 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# AWALIETS C

# TRAFFIC AND REVENUE 1936 AND 1937 - CARQUINEZ BRIDGE

## PRESENT RATES AND RATES PROPOSED BY J. G. HUNTER

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### 37 - CARQUINEZ BRIDGE

# OSED BY J. G. HUETER

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[fol. 776] Mr. Thelen: Proceed, Mr. Ready.

A. On the lefthand portion of this first table you will find the same data as to total revenue as shown on page 6 of Mr. Hunter's Exhibit No. 23. I think about the only difference is a difference of 1000 vehicles under the item of 1936 where he shows 1,467,052 and we show 1,468,052. Our figure, I think, is the correct figure. It is a matter of addition based upon Mr. Dunford's figures. I think that is just a typo-

graphical error.

On the righthand side we have set up the number of vehicles and revenue on the basis of 11 per cent stimulation in travel for the year 1936 and the year 1937 to compute the revenue that would have resulted had the rates been reduced by the amount suggested by Mr. Hunter at the beginning of 1936 or beginning of 1937, or sufficient prior thereto to have gotten the full 11 per cent stimulation of traffic. The number of vehicles listed as cash automobiles have been increased by 11 per cent and the price of 50 cents per vehicle applied. The other revenue from automobiles has been assumed to remain the same, that is, the commute rates to the WPA employes. Trucks have been continued at the same rate as before, as there were no suggestions as to reductions on trucks. The same thing applies to stages and to miscellaneous vehicles. Now, the average effect of the 11 per cent stimulation on automobiles would be to increase the total number of vehicles by 8.69 per cent, based on 1936, and 9.05 per cent in 1937, or an average of the two of 8.87 per cent increase. That is due to the fact that the 11 per cent increase is applied to the automobiles and the percentage just read applies to the total vehicles, including trucks, busses and miscellaneous vehicles. [fol. 777] In the item of passenger and pedestrian revenue, as I stated in the previous exhibit, we obtained the experience of one additional or extra passenger to each 20 vehicles, so in this set-up we have included that amount at 5 cents per passenger and it accounts for the figure of \$2,090.40 under 1936—no, I mean \$2,900.40—and \$3,522.75 in 1937. balance of the passengers and pedestrians and employes on stages and trucks have been computed at 5 cents as noted and the commute rates left the same as before. That gives this result, that the net effect of the reduction in rates in the gross revenue of the Company would be a reduction of \$330,165.07 on the 1936 basis, and for 1937, \$399,274.30. That is to be compared with Mr. Hunter's estimate for

1937 of \$385,183.05, or approximately \$14,000 gr-ater. His 1936 estimate I will have in a minute. His estimate for 1936 was \$318,563.45, shown on page 12 of Exhibit 19, com-

pared with \$330,165.07.

[fol. 778] Mr. Thelen: As I understand it, Mr. Ready, we are now in this position, that in Exhibit No. 11 gross revenues, operating expenses, depreciation annuity, and so forth, together with net for return, on the assumption that the existing tolls continued throughout the remainder of the franchise life; then turning to the exhibit which you have just been dealing with, Exhibit 134, you have made a similar computation, with one important change, however, namely, that the reduction in passenger automobile rates suggested by Mr. Hunter be made effective.

A. Would be made effective, not the suggestion that they

be, but that they would be made effective.

Q. Very well, Having those two exhibits before you, have you prepared a final or closing exhibit which summarizes the principal figures shown in the two exhibits to which I have just referred?

A. I have.

Mr. Thelen: We will now ask, if the Commission pleases, that the exhibit consisting of three sheets, which exhibit does not have a title page, be introduced and marked Exhibit 135, I think it is.

Commissioner Riley: That is correct, yes; Exhibit 135, so noted

Mr. Thelen: In order that the record may be clear as to these sheets, the first sheet is headed "Summary of earnings, Carquinez Bridge", with two subdivisions, one being based on continuation of present rates and the other being based on tolls proposed by J. G. Hunter; the second sheet being the same except that it refers to the Antioch Bridge, [fol. 779] and the third being a consolidation of the Antioch and the Carquinez Bridges.

Commissioner Riley: It will be so received and marked

Exhibit 135.

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COMPANY ERH. 135	Summary of Earnings	Carquines Bridge

American Toll Bridge Company Table No. 1

			Met IOF	resurn	Amena	d Raturn +		Net for	Return	Earnings	in Excess of
	Average	Gross		% on		The same of	Gross			Assume	Return t
	- Paris	Kevenue 2	Arount 3	Capital 4	For Year	Accumulated	Revenue	Amount	Capital	For Year	Accumulate
		2			23 388	3				01	
	7,106,337	630		8.62	57 008	2			****	******	
	7,385,207	88		6 82	223 7KF	366					
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	7,946,753	1,158		8	144 200	200					
******	7,954,810.	983		6.42	284 435	38				******	
1966	7,950,995	Š		5.82	320 208	910					*******
	7,946,464	98		8 8	261 194	141					
	7,946,068	1,068		7.42	125, 847	1,507					******
	7,947,411	1,314		10.80	220 703	1,087					
	7,949,537	1,552,		12.12	327 853	900	-	-	20.00	-	-
	7,049,537	4		10.84	225.526	813		-	12.12	927,808	-
	7,949,537	1,465,		11.23	257, 103	556		-	10.10		-
	7,949,537	1,490		11.55	281,813	275,	-	-		-	-
	7,049,537	1,518,		11.67	291 386	18	-			-	_
	7,949,537	1,548		11.91	310 837	202		•	5.0		٠.
	7,949,537	1,476		12.09	325 208	AKO,			500		-
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	7,949,537	1.686		12.47	255, 215	2	-	~	8.58	•	
	7,949,537		145.774*	00	251 768*	789 151	148 966	67,000	8.3	60,232	1,049,224
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1927-	7,858,224	1,335,281	77,5,127	9.86	85,212		1.138.127	630.067	60 8	KO 047*	
							*	CAN'S BALL	9		

1—10% Through 1934, 9% in 1935, 8% 1836-1948 --Red Figure

[fol. 781]					COMPANY	rr Exn. 135					
				Am	Carquin erican Toll Table	Carquinez Bridge n Toll Bridge Comp Table No. 2	eny			۱. <u>.</u>	
		Валес	on Con Net for	Continuation for Return	Antioo of Present	Antioch Bridge esent Rates ninge in Excess of	Based on	Tolls Prop	Proposed by	J. G. Hunter	iter (Exh. 19
	Average	Gross	Amount	% on	Assume	Return †	Gross		of on	Assumo	in Excess of
1926	\$1,542.94;	e4 8	3	+	5	Accum	Revenue 7	Amount.	Capital	For Year	Accumulated
1928	1,645,586	25	347	000	164,212	827					-
1929	1,716,422	38	62,091	3.2	140,828	168			* * *	3	
1931	1,728,619	157	65,087	33,78	106,973	200					
1983	1,737,540	38	7,819	1.64	146,874	946		•			
1936	1,737,599	107,913	20,468	1.18	153,286	295,482	****		0		
1937	1,739,358	88	28.071	2.54	94,840	100			2.54	\$04 840*	101
1936	1,739,358	135	68 990	3.67	75,398	1,691	125,240	28,071	1.61	111,078	1,616,066
1941	1,739,358	135,	58,431	98.0	80,718	1,862			1.89	106,330	1,832,455
1943	1,739,358	135	54,751	30.00	84,398	2,019			1.76	108,643	2.049 815
194	1, 739, 358	135,	53,069	3.28	82,080	2,101			28.2	107, 423	2, 157, 250
1946	1,739,358	135	49,556	2.82	89,593	2,276			1.68	109,870	2,374,650
1947	1,739,358	135,	45,382	2.61	92,236	2,368,			1.40	112,722• 115,630	2,487,372*
Average	000,000		18,082	2.08	51,492	2,513,			1. 91	52,979	2,720,829*
1648-}	1,722,763	426,876	39,531	2,35	109,303*		110 799	90 001			

[fol. 781]

1048

1-10% Through 1934, 9% in 1935, 8% 1936-1948 -Bed figure [fol. 783] Commissioner Riley: Do you wish to cross-ex amine Mr. Ready on any matters testified to, Mr. Rowell

Mr. Rowell: No, Mr. Commissioner, I just have one question. Have you made any study, Mr. Ready, as to the possible increase in truck traffic in the event of a change in rates, lowering of rates?

A. I have not.

### J. WILBUR HAINES, recalled.

Direct examination resumed:

Mr. Thelen: You will remember, Mr. Haines, at the time you were on the stand before some interest was evidenced in the question of the Federal taxes as shown by you or your Exhibit No. 126?

A. Yes, sir.

Q. State, please, whether or not at my request you have prepared a supplement report which shows in considerable detail the exact computations which you used in computing the various classes of Federal taxes?

A. Yes, we have prepared a supplement to Exhibit 126 another report containing two exhibits which we have called Exhibits A and B, the first of those being a statement of estimated taxable revenues and deductions therefrom, and Federal taxes based thereon, by years, for the period January 1, 1938, to June 30, 1948; and the second one being actual computations of estimated Federal taxes based of the estimated revenues and deductions set forth in Exhibit A for the same period.

Mr. Thelen: If the Commissioner pleases, we ask that the report to which reference has just been made be introduced and marked Exhibit 136.

Commissioner Riley: It will be received as Exhibit 13 and so noted, by the respondent.

### [fol. 784] CHARLES DERLETH, JR., recalled.

Cross-examination:

Mr. Rowell: Professor Derleth, you have in your previous testimony explained rather fully and very interestingly

the curve of construction, particularly during the period up to January, 1925, during the period when Duncanson & Harrelson were doing most of the work. I would like to confine my questions now, Mr. Derleth, to the period subsequent to January, 1925. I think you stated that the Raymond Concrete Pile Company took over the work on February 1, 1925, under which you termed the "interim" agreement. Now, there was placed in evidence an exhibit, Exhibit 124, which purports to be an agreement dated January 24, 1925, made between the American Toll Bridge Company and the Raymond Concrete Pile Company. I wish to ask you if that is the only agreement which you had with the Raymond Concrete Pile Company!

A. I told you last December that those agreements were not directly my concern, but that I was conscious and knew that they existed and I acted, as the chief engineer, from February 1, 1925, to April, 1925, in accordance with the interim understanding. Whether there were any other agreements between the American Toll Bridge Company and its president, Mr. Hanford, and the Raymond Concrete

Pile Company, is not known to me.

Q. What I wish to know is this: What were the circumstances and when did the Missouri Valley Bridge Company take over the work which, as I understood you to say was

about February 1, 1925?

A. The Missouri Valley Bridge & Iron Company, as an intended sub-contractor throughout the completion of the [fel. 785] bridge, actually started the field work and related work February 1, 1925.

Q. Was that under a new contract made with the Missouri

Valley Company?

6

A. Not at that time. And during February and March and into April 10th, I think, 1925, the Missouri Valley Bridge & Iron Company was a sub-contractor of the Raymond Concrete Pile Company, and we were dealing with the Raymond Company. However, on April 10, 1925, the Raymond Company decided to quit. The Missouri Valley Bridge & Iron Company continued without interruption and eventually entered into a contract of its own to complete the foundations, and similarly the American Bridge Company acted in the same way.

Q. Then there was reference made to a payment of approximately \$110,000 to the Raymond Concrete Pile Com-

pany, of which I believe about \$51,000 or \$61,000 went to the Missouri Valley Bridge & Iron Company; is that correct?

A. That is correct. I believe I fully stated in December that the total sum paid was about \$110,000, of which \$50,000 was to the Raymond Company. The rest of the money, about \$61,000, as you say, or a little more, was for construction actually made between February 1, 1925, and into April. And of that sum, only \$1200 went, as I remember, to the Raymond Company; the rest of the sum, something over \$60,000, was paid to the Missouri Valley Bridge & Iron Company for the actual work which they did on the various piers—Piers 2 and 3, 4 and 6, 7 and 8.

Q. Then it was in a measure on a cost-plus basis until the time that the Missouri Valley Bridge & Iron Company

entered into firm contracts?

[fol. 786] A. That is correct; it was in accordance with the rates that had been agreed upon for the interim agreement.

Q. I wish to show you a copy of a letter purportedly signed by you and addressed to the American Toll Bridge Company, dated April 20, 1925, and ask if you recognize that communication (handing to witness)?

A. Yes, that is my signature.

Mr. Rowell: I will ask that that be introduced in evidence as the next exhibit in order.

Commissioner Riley: It will be received as Exhibit 13, by the State.

(Here follows one photolithograph, side folio 787)



514A

787

\$61,000 went to my; is that cor-

ted in December of which \$50,000 t of the money, vas for construc-1925, and inte-as I remember, sum, something Valley Bridge & they did on the and 8.

plus basis until & Iron Company

accordance with he interim agree-

ster purportedly rican Toll Bridge if you recognize

duced in evidence

d as Exhibit 137,

side folio 787)

1. Diamond drill borings 2. Excevation at Pier 1 3. Ex		Tenna
\$42,261. 11,416. 11,416. 126,534. 68,934. 77,091. 269,028. 1. 89,863.	Complete	Cost
#42, 261. 11, 418. 126, 534. 68, 934. 277, 091. 269, 028	Including	
11.418. 126.534. 68.934. 277.091. 269.028. 	4	642,261.
and 89.863.		11.418.
68,934. 177,091. 269,028. 	\$173,466.	300.000
277,091. 269,028. 	29,700.	98.634.
and 89.863.	63,000.	260,091.
end 89.863.	1,307,000.	1.576.028.
and 89.863.	2,687,000.	2.687.000.
and 89.863.	150,000.	150,000
and 89.863.	35,000.	35,000.
\$785,129.	41	BO BER
	4,465,166.	\$5,250,295.
11. South Approach		8,500
12. North Approach		32,000



[fol. 788] Mr. Rowell: I note, Professor Derleth, that at the bottom you refer to certain starred items as bids received and accepted from the Missouri Valley Bridge & Iron Company and the United States Steel Products Company, those being in reference to Piers 1 to 5 and 12, inclusive, Piers 4 and Piers 2 and 3 and the superstructure. Now, was there a firm contract made with the Missouri Valley Bridge & Iron Company at that time?

A. Yes, there was a contract made with the Missouri Valley Bridge & Iron Company to complete all sub-structural work, which contract I think was finally signed by the president. Mr. Tulloch, at a later date because of the ironing out

of certain details.

Q. On the piers alone there you have a total of about \$2,246,171: Now, would that have been the sum actually paid to the Missouri Valley Bridge & Iron Company for the

completion of the work on the piers?

A. No, because the agreement of the Missouri Valley Bridge & Iron Company was to do certain definite completing work; but I believe in December I mentioned that there was certain interregnum construction, particularly on Pier 4, which the Missouri Valley Bridge & Iron Company expected to do on a cost-plus.

Q. Isn't that a part of the work dome for which they

were paid in the making of that payment of \$110,000?

A. No, because this work to which I refer, particularly for Pier 4 and which was done after April, 1925, concerned the driving of the sheet piling around Pier 4, the placing of riprap and the preparation of the surface of the seal for the additional higher portions of the pier. And that work was an extra. And if my glance at this letter of April 20, [fol. 789] 1925, is correct, that sum is not here included.

Q. This would indicate that their estimate for the com-

pletion of Pier 4 was only \$83,000?

A. For the portion above the seal, but not including the preparation of the surface of the seal, the placing of riprap around the pier and the driving of these sheet pile enclosures which consisted of sheet piles some 70 feet long and which was an entirely additional item and paid for on a cost-plus basis by the American Toll Bridge Company to the Missouri Valley Bridge & Iron Company in the period of about May 1, 1925, to some date in the beginning of 1926.

Q. The reason I am interested, Professor Derleth, is because the books of the Company seem to indicate that the

total sum paid the Missouri Valley Bridge & Iron Company was \$1,417,660.15, which is substantially the amount, or a little less than the amount, which appears to be reflected

by your figures as shown in this letter.

A. I would have to examine the records of which you speak to comment at all on your last statement. I am speaking from memory, and my memory is very clear on what actually did happen. The Missouri Valley Bridge & Iron Company did certain work following February 1, 1925, in the interim agreement, for which they were Paid about \$60,000. Then they entered a definite contract with the American Toll Bridge Company to complete all of the piers and, as I have said several times, in addition to that they did this special work on Pier 4.

Mr. Rowell: That is all, Professor.

### Redirect examination:

Mr. Thelen: Mr. Derleth, I should like to ask you a few [fol. 790] questions in connection with Exhibit 137, which is a letter from yourself to the American Toll Bridge Company. You have a copy of that letter before you?

A. Yes, sir .

Q. Have you had an opportunity to read it this morning

A. No, I have just glanced — it and I recognize that wrote it.

Q. Will you kindly read it to yourself and then I wish to ask you a few questions concerning it?

A. Yes, sir.

Q. You show there, Mr. Derleth, certain items which total \$5,390,795.

A. Yes, sir.

Q. Then, as I understand it, the next paragraph start this way, "The above total is the structural cost, not in cluding value of lands, rights of way and certain othe items". And if I may pause there, referring to the subject of the structural cost, you show in your letter itself, do you not, that even that figure is not the complete structural cost because it does not include the value of lands and rights of way?

A. Well, there are some other things it does not include and there are reasons why they were not included at this

time. .

Q. I am going to ask you a few questions and then I wish you, out of the fullness of your knowledge, would add matters that do not occur to me. So far as structural cost is concerned, you show on the face of the letter that that does not include items of structural cost such as items of land and rights of way.

A. That is correct; but there are some other things here

not mentioned, and there was a reason for it.

Q. Well, do those items include anything for cost of [fol. 791] fender?

A. Nothing at all; the fender cost some \$625,000 in addi-

tion,

Q. That is also structural cost, is it not?

A. The costs that I have just this morning been discussing with Attorney Rowell are not here, namely, that uncertain cost at this time, which was to be done on a cost-plus basis, and in accordance with my orders which Mr. Hanford loped would not have to happen, and it amounted to another \$100,000.

Q. Now, may I go a step further-

A. When people write letters at an early date like this there are sometimes reasons why they do not include all items.

Q. Well, if you will just finish what you have in mind I will be glad to have you do that, and then if there is anything left I will be glad to make inquiry concerning it. Will you

add whatever you have in mind?

A. As I say, this cost does not include those special constructions around Pier 4; it does not include the \$625,000 and more which we eventually spent on the fender, ending about February, 1931; it does not include the additional expenses of running a fine engineering establishment to December, 1930; it does not include the costs and improvements to certain lands and rights of way, etc.

Q. Now, may I develop these "etcet-ra" just a little? Does that item of \$5,390,796, or does the item of \$6,000,000 shown at the end of the next paragraph, include anything for

interest during construction?

A. No, it does not; it was not necessary for me to say

anything about that.

Q. Are you familiar with what was shown on the books of the Company with reference to such overhead items as [fol. 792] interest during construction?

A. No, I didn't wish to be concerned with those items; I had nothing to do with the navigation companies, and so forth.

Q. Did these figures, either the \$5,390,000 or the figure of \$6,000,000 later shown, include other overhead items such as general expense carried on the general books of the Com-

panyf

A. No, those were matters outside of my purview. In fact, I didn't want to have anything to do with them, I had plenty to do as chief engineer. This is a statement to Mr. Hanford as to about how much he had to raise at that time to complete his bridge, ready to open it to traffic, and it did not include the fender, and he knew it.

Q. I imagine it did not include other overhead, such as

engineers include as preliminary expenses?

A. No.

Q. Did it include the overheads for engineering, even!

A. No, I have already said it did not include a lot of additional engineering which is not here contemplated, because this was written with the idea of what he would have to pay in order to get his bridge open and begin to get some tolls.

Q. May I ask whether that figure of \$6,000,000—parden me, strike that. I want to refer to the last sentence of that paragraph, "In my judgment, the value of the bridge, when completed, is not less than \$6,000,000," and I want to ask you whether, in using that figure of \$6,000,000 you had in mind the item to which you referred in the earlier part of the paragraph, which is structural cost, or whether you intended to include all the overheads?

A. No, this is structural cost less such things as—this is construction cost, not including a fender and certain other

items that I have already stated.

[fol. 793] Mr. Thelen: I think that is all.

Mr. Rowell: I think, Mr. Thelen, I should beg your pardon for leaving any intimation that this was introduced for the purpose of indicating that the total construction cost, as estimated here by Mr. Derleth, was there shown. It was for the purpose merely of trying to find out how much was actually paid under the contract of the Missouri Valley Bridge & Iron Company.

Mr. Thelen: Well, thank you for that. Of course, I could not know what was in counsel's able head and I was somewhat apprehensive lest that figure of \$6,000,000 be used for

something for which there was absolutely no justification, and that is the reason I wanted to have the record clear.

The Witness: May I make one closing sentence.

Mr. Rowell: Certainly.

A. I believe I told you when you asked me a few questions last December that Mr. Hanford in that period used to ask m almost every month to write a letter of this kind, and later similar letters, so that he might use them with his bond houses. And I think it perfectly sane and right for me to tell you that there were certain things omitted there. Nobody knew what the fender would cost, and we were considering what he had to do to get the bridge open to traffic, and he knew the navigation companies and the Sugar Company were going to try to prevent him from opening it, and so on and so forth/ He knew he had to build a fender. At that very time that I wrote this letter the navigation companies, under the leadership of the Matson Company, wanted us to build a fender which would have cost \$1,100,-000, and the records of the War Department hearings will [fol. 794] show that my statement is correct. Building a bridge is like a poem, it grows as you read it.

Mr. Rowell: Thank you very much.

Commissioner Riley: We will have a short recess. (Re-

cess)/ Proceed, Mr. Rowell.

Mr. Rowell: I have some questions of Mr. Ready, Mr. Commissioner, and I think we will have no questions of any other witness.

### LESTER S. READY, recalled.

Cross-examination:

Mr. Rowell: First, Mr. Ready, going back to your value exhibit, 117, page 26—do you have that before you?

A. Yes.

Q. Now, getting down to your item's below, engineering overheads, for engineering I understand that you allowed

3½ per cent, is that correct?

A. No, engineering and inspection, the actual, that is approximately 6.03 per cent; that is, that which was charged exclusive of the \$24,307, which was strictly construction expense.

Q. Item 8, then, was the actual book charge?

A. Yes.

Q. And your overheads, 5 per cent, did you make my

breakdown of that?

A. No, I did not. It is a judgment conclusion, as I think I stated, or should state. If it was a normal condition as of the present time, 4 per cent, I believe, would be adequate for the item of general expense, but in view of the problems and difficulties that this Company had at the time, the promotion of a bridge or the organization of a bridge and earrying it on to completion under the conditions and the oblight. 795] stacles presented, 5 per cent was, in my judgment, fair. I didn't break it down at all.

Q. Did you analyze the reported general construction

overheads?

A. Not in determining this figure.

Q. Didn't give it any consideration?

A. Well, I could not justify it in my mind as a reason-

able figure.

Q. Is the same to be said about your next item of preliminary expense, organization, 3½ per cent?

A. Yes.

Q. You have not broken that down!

A. No; that is, I didn't attempt to build up an organization and determine the salaries of the different individuals or how much money they had to pay to individual concerns. But as I stated, were it a normal condition of the present time where bridges had been built and this difficulty of promotion and construction obstacles did not exist to the extent they did, that the 2½ per cent would have been reasonable, but that in view of all the facts on a historical basis, 3½ per cent was a fair figure for this item.

Q. And you gave no consideration to the actual book

expenses?

A. I didn't attempt to try to decide what items were reasonable and what were not. What I was trying to do was answer this question: If I were making a historical appraisal of this property, what overheads would I have allowed as reasonable, in that case not knowing exactly what they had actually spent, even.

Q. Turning next to your Exhibit 119, interest during construction, the first page shows interest during construction of 9.6 per cent as indicated on the Company's books. Now, I take it that that is merely actual amounts

charged for interest and amortization applied to the base

[fol. 796] capital figure there shown?

A. Yes, the 9.6 is the result of dividing one item by the other. The Company, as I think I explained, included under "Interest during construction" interest they paid on moneys they had borrowed under the bond issue only, and then included amortization of bond discount and expense for the period under construction or during construction, and that totaled this \$688,093. That is not a correct method of determining interest during construction for a construction job.

Q. You are not implying that the Company actually incurred more than \$688,093 for interest during construction?

A. Oh, yes; I think if you mean by "incurred" that they didn't pay somebody else that money, I would say you are probably right. But the man who advanced the money, put up the stock money, was entitled to the cost of money during the time it was out, and in that sense he incurred that because he could have invested it some place else but he put it into this job. He started in, as a matter of fact, in 1925 and, as I show in this curve, there was \$1,300,000 odd put into this property prior to the time that any bonds were issued. Now, under a sound valuation basis or sound cost basis he is entitled to some interest rate under interest during construction, the same interest rate as the money that was borrowed. There is not any question about that on a sound valuation basis. For accounting purposes the same thing, we have the right to capitalize that interest during construction.

Q. Whether the cost was incurred or not?

A. Yes. Suppose it was all by stock, suppose all the [fol. 797] money was invested through stock, common stock; they are still entitled to capitalize interest during construction of the job.

Commissioner Riley: It would be still proper to capitalize it at 9 per cent when the going rate for money was

substantially less?

A. Yes; but the going rate for this project was 9 per cent, not 7 per cent. If it had been the Pacific Gas and Electric Company at that time, the going rate was probably 6½ or 7 per cent for bonds or preferred stock, but in this type of enterprise the cost of money was 9 per cent and that was the basic cost just the same as what it cost them to buy their material. The money cost them, that is, to

get the money to do it with, cost them 9 per cent per annum. Now, you can say that the State could have gotten it for 5 per cent, and if they took it out of gas tax it cost nothing and, therefore, if it came out of the gas tax, you shouldn't charge interest during construction, and therefore, applying it to this, you can say the public rate is zero and, therefore, don't charge any interest during construction.

Commissioner Riley: I guess I didn't make it clear what I meant. There is a difference between stock money and bond money. The money they got from stock, the 9 per cent return on that is a pretty substantial return, wouldn't

you think?

A. Well, it would be for the Pacific Gas and Electric Company.

Commissioner Riley: Wouldn't it be for a private in

vestor?

A. Not for this concern, just taking the hazard of the business. Now, the measure of the cost of money is the cost of bond money, and you apply that to the entire money included in determining the interest during construction. If you apply Mr. Mitchell's method, instead of [fol. 798] getting 14 per cent you would get about 19 or 20 per cent interest during construction. On his assumption that money cost 8 per cent, the way he figured it, you would get about 19 per cent interest at least for interest during construction, because he assumed something not only unsound but impossible—financing through bonds alone. But that doesn't mean the stock money is not entitled to have interest on that capitalized—that is, unless we have a new method of valuation that has not been tried by this Commission in the past or any valuation experts.

Mr. Rowell: Turning then to your Exhibit 129, cost of money, and referring to page 5, I take it then you have used 9 per cent on the bonds and stock and 6 per cent on

the depreciation reserve?

A. In that table at the bottom of page 5.

Q. Yes.

A. Yes. In view of the fact that the original bond money cost 9 and that the new bond money cost 8.95 or thereabouts—that is, new bond money when we consider amortization of bond discount and expense for the entire period—I have assumed that the money that the Company invested from stock and bonds cost 9 per cent and that the money that was obtained through the retirement in a

mee from that, or through depreciation reserve, computed at 6 per cent, must have cost 6 per cent. Now, that is in a sense the method you would follow if you were determining rates for the Pacific Gas and Electric Company or any other utility; you would take preferred stock money, bond money and depreciation reserve money and any other borrowed money, and you would apply the cost of the preferred stock money and bond money, weighted in with [fol. 799] the depreciation reserve money, to get the average cost of money at any one time. And that was what was done in this proceeding, as I understand it, and then they allowed a fair return, which was approximately 1.15 times that cost. Now, what I did here was to apply 9 per cent to the moneys that were raised through bonds of stock.

Q. First I want to ask you, why did you arrive at 9 per

cent! I do not find that exact figure in your exhibit.

A. No, the figure came out 9.07 and 8.95, that is, the interest—the cost shown on page 1, sinking fund basis, showed an over-all cost of 9.07 and I used 9 per cent. believe these cases are not decided to the tenth decimal place or even the third decimal place very often, so you only confuse yourself by getting down into four or five decimal places to try to be exact, when the whole thing is not that exact. I have used 9 per cent, which - think is fairly correct because in one case it shows 9.07 and the other case 8.95, and the periods are about the same. If you use a ratio which is lower than any that has been normally used for a high cost, hazardous company, you come out with that rate of return on that basis. ter of fact, when I got through with this, you will not- for the rest of the exhibit I use 10 per cent, 9 per cent and 8 per cent for rate of return used in computing the interest, compared with this, which would average about 1.2 per cent higher than that.

Q. Now, in determining the cost of money at 9 per cent, then, you have included not only the current cost, including interest and amortization on the existing bonds, but you [fol. 800] have included the unamortized discount and ex-

pense on the prior bonds?

A. Yes; otherwise, the cost of money in the first 10 years must be increased because you amortize it over 10 rather than 20 years.

Q. Was the amount of the new bond issue equal to——A. No, but there was unamortized bond discount and

expense remaining from the original issue to be amortised over the remaining issue, as I saw it.

Q. Wasn't some of the rew issue used to pay off the dis-

count on the old?

A. No, to pay off the premium on the old. Q. To pay off the premium, I should say.

A. Yes. And that is why I deducted it, because the net amount of cash on the new basis was less.

Q. What the Company needs to accrue now is a sufficient amount to pay off the new bonds at their maturity?

A. How do you mean by that, as cash?

Q. Needs to accrue in cash, in order to meet the maturity of the bonds.

A. Oh, yes, that is true, as far as the cash is concerned.

Q. Turning to Exhibit 132, Mr. Ready.

A. Yes.

Q. And to Table 4 of that exhibit. Take the year 1938, for example.

A. Yes, I have it.

Q. And refer to your Federal income taxes. Was that amount your estimate of income taxes payable on the 1938 estimated revenue?

A. No.

Q. Or 19371 .

A. 1937.

Q. And is that true throughout the years?

A. Yes. There is a lag of a year. I explained, I think, the fact that in 1948 it becomes almost as much as the [fol. 801] revenue, because it is the 1947 income that determines the tax, but the Company has in the past and is accounting for the tax on the payment basis rather than accrual basis.

Q. Now, will you turn to Exhibit 133, which is the estimated increase in automobile traffic under the proposed rate

reduction as testified to by-

The Witness: I might state—I think it was pointed out to me that there was an error in certain of the figures which. I used in preparing this exhibit. There was an error in the figures I had used from Dr. Edwards' exhibit for the stimulation of traffic in connection with the reduction of fares on the Bay Bridge in February, 1937. And instead of there being a stimulation of slightly over 16 per cent there was an increase in February over January of approximately 28½

per cent, part of which bould be adjustable from the trend of traffic.

However, I would say otherwise, had I given this matter consideration in connection with the original estimate, I am confident my figure would have been 13 or 13½ per cent simulation rather than the 11 per cent. I don't know whether that answers your question, but I feel that the stimulation of traffic to the bridge would approach very elgsely, if not equal, Mr. Hunter's estimate of 13½ per cent.

Q. All of your computations made in this exhibit are tased upon that curve which you originally had shown on chart 87

A. That is correct, and that the net result would be a somewhat higher gross revenue and net revenue than previonly given. In fact, I went through to see just what those figures might be, if you would be interested in them. That [fol. 802] is, if you took the 2½ per cent it would be the 13½ per cent estimated by Mr. Hunter as a possibility, and I think it might approach that, it would represent an equivalent increase in total traffic over that estimated at 21/4 per cent, because your 21/2 per cent would be divisible by one eleven. That, in turn, would be multiplied by the average of 66.8 per cent, because the automobile traffic revenue represented 66.8 per cent of the total, which would give you 11/2 per cent as an increase in gross revenue, and that 11/2 per cent increase in gross revenue would amount to an average of \$18,750 per year or \$191,650 for the ten and a little over years. Now, as to the increase in net, which is the other important item, it takes \$1.281/2 of gross to equal \$1 of net, on account of the various taxes which this Company would have to pay. That is about an increase—if the total revenue was increased in the next 10 years by \$191,650, the increase in net revenue to the Company would be \$149,000, because 2 per cent of the gross would go to the counties, 4 per cent of the remainder would go to the State and 15 per cent of the remainder would go to the Federal income tax, to the Federal Government in one tax, and for the lest 4 years an additional 6 per cent would go to the Federal Government. So that the increase in the net revenue shown in the table for the total company, not for the Carquinez Bridge separately but for the total Company, would be \$149,000 for the remaining life of the franchise, or \$14,550 per year average. I wanted to get it into dollars and cents.

## Redirect examination:

Mr. Thelen: Right on that point, referring to the table [fol. 803] to which you have been referring, which is Table 3 of Exhibit 135, and to the last column, which is column 11 you show at the present time, do you not, a figure there is the red of \$3,996,962?

A. Yes.

Q. And that represents the result of the operation throughout the remaining period of the franchise on the assumption that the rates proposed by Mr. Hunter are madeffective?

A. It was the net return below that figure of 10, 9 and for the entire period but assuming that the rates propose by Mr. Hunter were in effect from January 1, 1938, to the end of the franchise.

Q. As I understand it, as a result of the correction factor which you have just applied, you have a figure of \$149,000 odd in the black?

A. That is correct.

Q. And by deducting that \$149,000 from the \$3,996,962 is the red, the net result of the correction of this error would still be to show a figure in the red amounting to approximately \$3,847,000?

A. That is correct.

Q. Now, I have just a few questions dealing with a matter concerning which Mr. Ready testified once before. Have you given consideration, Mr. Ready, to the matter of item of cost which it is necessary for the American Toll Bridge Company, as a private utility, to bear, which items are no borne by a public bridge such as the San Francisco-Oaklan Bay Bridge?

A. Yes.

Q. Will you proceed in your own way, please, to give the

results of your studies on that particular subject?

A. Well, in view of the suggestion by Mr. Hunter that 50-cent toll applicable to the Bay Bridge might well be applicable to the Carquinez Bridge, I thought it well to set u [fol. 804] an indication of at least those items which the American Toll Bridge Company has to pay and that are not carried by the toll charges of the Bay Bridge. I realize the two bridges are not entirely comparable, and yet when you stop and consider that the Bay Bridge, it is true, cost above eight times as much but is located adjacent to two very large

communities and has the equivalent of practically ten lanes of traffic—could have 11, 9 lanes for automobiles and 2 for trains—compared with a possible 3 lanes on the Carquinez Bridge, it seemed to be worth while to set up, at least for consideration, those costs which the Carquinez Bridge and the Antioch Bridge pay, costs that are not charged against tolls on the Bay Bridge. And for that purpose, and summarizing it in form, I have prepared a statement with a table that summarizes those figures. I might read it. It won't take more than a few minutes.

Mr. Thelen: I would ask that that statement be introduced and marked Exhibit No. 142.

Commissioner Riley: 142 is correct. So received and noted.

(Here follows Exhibit No. 142-pages 1, 2, 3.)

[fol. 805]

COMPANY EXHIBIT 142

# Witness Ready

Items of Cost of American Toll Bridge Company not Chargeable to Tolls under San Francisco-Oakland Bay Bridge Operation

The suggestion has been made that the 50¢ toll on the San Francisco-Oakland Bay Bridge be considered as the toll, applicable to the Carquinez Bridge. There are certain items of cost incurred by the Carquinez and Antioch bridges which are not chargeable to tolls in the case of the Bay Bridge and it is important to keep this fact in mind in considering the applicability of the 50¢ Bay Bridge toll to the Carquine and Antioch bridges.

The arrangements between the California Toll Bridge Authority and the RFC provide that the operating and maintenance expenses of the Bay Bridge are to be paid out of gasoline taxes so that all of the revenue is applicable to payment of interest and amortisation of bonds. The Bay Bridge, having been built by a State authority, is free from all local and Federal taxes, which amount to relatively large sums in the case of the American Toll Bridge Company.

The attached table shows (Item 1) the estimated gross revenue under present rates for the period 1938-1948, inclusive, and the average revenue per year, based upon Exhibit

No. 132. There is also set up the item of Costs of the Ame can Toll Bridge Company not required to be met by to on the Bay Bridge. These charges the American Tollinge Company has to pay out of toll receipts, and the include:

- (1) Operating and Maintenance Expenses (which on the Bay Bridge are charged against the gas tax).
  - (2) Local, County, ad valorem and gross revenue taxe
  - (3) State franchise taxes.
  - (4) Federal Income taxes.

In addition, the retirement of the costs of the bridges limited to about 20½ years, compared with the period which may be taken at 40 years for the Bay Bridge, although the estimates contemplate retirement of bonds of that bridge in a somewhat shorter period of time. This latter item accounts for an annual cost of \$142,771, and a total payment of \$1,460,047 within the remaining period in excess of who would be necessary under a 40-year amortisation period.

It is to be noted in the table that if the American To Bridge Company's bridges were relieved of costs n chargeable to tolls, as in the case of the Bay Bridge, cos amounting to \$621,932 per year or an approximate total \$6,360,000 could be eliminated, thus reducing the require revenue by 36.9%, which would make possible rates co siderably lower than those on the Bay Bridge. This wou involve loss in revenue to the counties Contra Costa, Solar and Sacramento, totaling \$1,147,577, a loss to the State \$337,756 in franchise taxes, and a reduction of \$1,662,698 Federal income taxes from this source, during the remain ing period of the franchise. In addition, the money available able from the gas taxes for other purposes would be reduced by more than \$170,000 per annum, or over \$1,750,000. [fol. 806] Reversing the process, the costs to be incurred by the American Tell Bridge Company's bridges during the remaining period of its franchises—if the 50¢ toll suggester by Mr. J. G. Hunter was established—would exceed the applicable under conditions comparable with those of the San Francisco-Oakland Bay Bridge, by more than \$5,100 000. If this amount were added to the revenue based on Be Bridge tolls (\$12,776,604 under proposed "Hunter" tolls a total of approximately \$17,900,000 would result, which in excess of the estimated revenue under present rates.

San Francisco-Oakland Bay Bridge Company not Involved in San Francisco-Oakland Bay Bridge Tolls—1978 to 1948

Present Tolls

	levenue	Total \$17,238,957	Average per Year \$1,685,714
Ban I	f Charges not met from tolls on Francisco-Oakland Bay Bridge:		
-0.00	Operating and Maintenance Expense charged to "Gas Tax"	1,752,112	171,331
	Ad valorem. 2% Gross Revenue	804,500 343,077	78,668 33,548
Q.	Total	1,147,577	112,216
(c)	State Franchise Tax	337,756 1,662,698	33,027 162,587
(e)	Total (b, c, d)	3,148,031	907,830
(1)	Total Above: (a, e)	4,900,143	479,161
(g)	Depreciation Annuity Required less same on 4% Sinking Fund—40 yrs	1,460,047	142,771
(h)	Total: (f, g)	6,360,190	621,932
not b	e incurred on Bay Bridge basist: (1) + (3)	,10,878,767 6:31%	1,063,782 6.31%

[fol, 808] Q. As I understand it, then, Mr. Ready, you draw attention in this exhibit to important items of cost which it is necessary for the American Toll Bridge Company to stand but which are not stood by the San Francisco-Oakland Bay Bridge?

A That is correct.

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Q. Among those items, as I understand it, you include, first, the entire subject of operation and maintenance expenses, because these expenses are all paid by the gas tax, as far as the San Francisco Bay Bridge is concerned?

A. That is correct.

Q. And you include local, county, and valorem and gross revenue taxes, state franchise taxes and Federal income taxes and then, as I understand it, you draw attention to the very important item of the difference in period of time during which the bonds have to be amortized?

A. That is correct.

Q. And then are there other items?

A. No, those are the items which this bridge pays out tolls, that the Bay Bridge does not pay out of tolls shows 36.9 per cent of the revenue under present rates the next 10 years goes to items of cost which are not curred by the Bay Bridge, and that does not involve question of rate of return, that is, it does not consider question of the rate of return at all.

Q. In other words, you have not gone into the fact that has been possible for the public authorities to get bonds at a lesser cost than is possible for a private concern?

A. No, those bonds cost about 4½ per cent as compar with the higher cost. But not attempting to give a comple [fol. 809] answer to the question, I thought it was well the Commission have before it an indication of some resons why the 50-cent toll on the Bay Bridge might not applicable to the Carquinez or Antioch Bridges. That in the next 10 years, if the present rates were to continuthis bridge would have to incur about \$6,360,000 more that would have to incur were the bridge treated in the same way as the Bay Bridge. The State would be out a third \$1,000,000 of income if the bridge were treated on the bas of the Bay Bridge, the counties would be out over \$1,000,00—\$1,147,000—and, of course, the Federal Government which is something different, would be out about \$1,662,00 from this source.

Mr. Thelen: That is all we have, Mr. Commissioner. Commissioner Riley: Would you like to brief this, M Thelen?

Mr. Thelen: If it were before any tribunal which has be less experience and is less intelligent than this one, I woullike to write a brief; but it seems to me before a Commission of this character it is a work of super-arrogation for any lawyer to write a brief and so, as far as I am concerne I am willing to submit it without writing a brief. Of course if Mr. Rowell wants to write one, I may have a few conments to make.

Commissioner Riley: What is your desire, Mr. Rowell!
Mr. Rowell: I would be very happy to receive a bri

from Mr. Thelen, but I think it is unnecessary unless ye desire to file one.

Commissioner Riley: Well, whatever your pleasure make. Is the case ready for submission?

[fol. 810] Mr. Thelen: We are ready to submit the case without the filing of a brief.

Commissioner Riley: It is submitted.

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[fols. 811-812] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 813] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed December 24, 1938

It is Hereby Ordered, good cause having been shown, that the time within which the above entitled case may be deducted and the record thereof filed with the Clerk of the Supreme Court of the United States be and the same is lereby extended to and including January 28, 1939.

Dated at San Francisco, California, this 19th day of December, 1938.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 8131/2-814] [File endorsement omitted.]

[fol. 815] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed January 25, 1939

It is Hereby Ordered, good cause having been shown, that the time within which the above entitled case may be docketed and the record thereof filed with the Clerk of the Supreme Court of the United States be and the same is hereby extended to and including February 27, 1939.

Dated at San Francisco, California, this 24th day of Jan-

pary, 1939.

Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 8151/2] [File endorsement omitted.]

### [fol. 816] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND OF NECESSARY PARTS OF RECORD—Filed February 25, 1939

Appellant in the above entitled proceeding intends to rely therein on each point set forth in its Assignment of

Errors.

Appellant represents that it is necessary for the consideration of this cause that all of the record filed in this Court be printed, except those portions thereof stipulated to be omitted in the Stipulation Covering Printing of Record between the parties, filed concurrently herewith, provided the Clerk, in printing the Transcript of Record, insert in lieu of the matters omitted the explanatory notes appearing in said Stipulation; otherwise, the entire record should [fol. 817] be printed.

Dated at San Francisco, California, this 16th day of Feb-

ruary, 1939.

Max Thelen, Attorney for Appellant.

Due service and receipt of a copy of the above Statement is hereby admitted this 16th day of February, 1939.

Ira H. Rowell, Roderick B. Cassidy, George E. Howard, Attorneys for Appellees.

### [fol. 818] STIPULATION COVERING PRINTING OF RECORD

It is hereby stipulated by and between the parties to the above entitled cause that the whole of the record on appeal in said cause shall be printed, except the following portions thereof:

1. Præcipe Item 3—Order of Supreme Court of California granting temporary stay of decisions and orders of Railroad Commission.

Insert the following note in lieu thereof:

- "Order of Supreme Court of California granting temporary stay of decisions and orders of Railroad Commission, filed on February 25, 1938, omitted in printing."
- 2. Præcipe Item 4—Suspending bond on temporary stay. [fol. 819] Insert the following note in lieu thereof:

"Suspending bond on temporary stay, approved by the Supreme Court of California and filed on February 25, 1938, omitted in printing."

3. Precipe Item 5—Order to show cause why operation of decisions and orders of Railroad Commission should not be stayed or suspended during pendency of writ of review.

Insert the following note in lieu thereof:

"Order to show cause why operation of decisions and orders of Railroad Commission should not be stayed or suspended during pendency of writ of review, filed February 25, 1938, omitted in printing."

- 4. Praecipe Item 6—Notice of application for stay and suspension of decisions and orders of Railroad Commission. Insert the following note in lieu thereof:
- "Notice of application for stay and suspension of decisions and orders of Railroad Commission, filed February 25, 1938, omitted in printing."
  - 5. Pracipe Item 7—Affidavit of service. Insert the following note in lieu thereof:
- "Affidavit of service of copies of petition for writ of review and other specified documents, filed on February 28, 1938, omitted in printing."
- 6. Pracipe Item 8—Order resetting hearing on order to how cause and extending order granting temporary stay of decisions and orders of Railroad Commission.

Insert the following note in lieu thereof:

[fol. 820] "Order of Supreme Court of California resetting hearing on order to show cause and extending order granting temporary stay of decisions and orders of Railroad Commission, filed on March 2, 1938, omitted in printing."

7. Præcipe Item 12—Order staying and suspending decisions and orders of Railroad Commission pending writ of review.

Insert the following note in lieu thereof:

"Order of Supreme Court of California staying and suspending decisions and orders of Railroad Commission pending writ of review, filed April 6, 1938, omitted in printing." 8. Precipe Item 13—Suspending bond during pendent of writ of review.

Insert the following note in lieu thereof:

- "Suspending bond during pendency of writ of reviewed April 6, 1938, approved by the Supreme Court of California, omitted in printing."
- 9. Præcipe Item 24—Bond of American Toll Bridge Company.

Insert the following note in lieu thereof:

- "Supersedeas bond on appeal approved, and to operate as a supersedeas, and filed October 28, 1938, omitted a printing."
  - 10. Precipe Item 25—Citation.

    Insert the following note in lieu thereof:
- "Citation, with statement directing attention to Rich 12, Paragraph 3 of Rules of Supreme Court of United

[fol. 821] States, with admission of service endormal thereon, filed on October 28, 1938, omitted in printing."

11. The original exhibits described in Item 29 of said Joint Precipe and Stipulation and certified to separately by the Clerk of the Supreme Court of the State of California.

It is further stipulated that all verifications may be omitted in printing.

Dated at San Francisco, California, this 16th day of

February, 1939.

Max Thelen, Attorney for Appellant. Ira H. Rowell, Roderick B. Cassidy, George E. Howard, Attorneys for Appellees.

[fol. 822] [File endorsement omitted.]

Endorsed on cover: File No. 43,189. California Supreme Court. Term No. 704. American Toll Bridge Company, appellant, vs. Railroad Commission of the State of California, et al. Filed February 25, 1939. Term No. 704, O. T., 1938.

(623)



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CHARLES FLHORE GROPLEY

PREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

# No. 704

RICAN TOLL BRIDGE COMPANY, A CORPORATION,

Appellant,

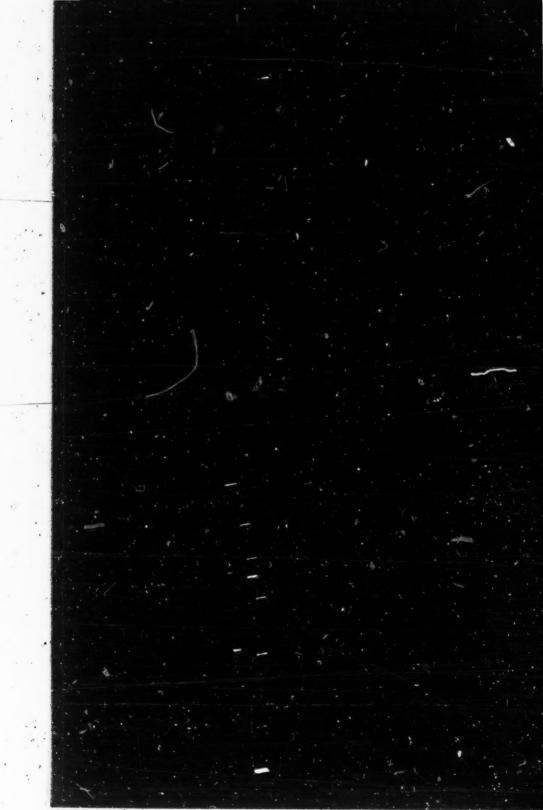
28.

RNIA, WALLACE L. WARE, FRANK R. DEVLIN, Y L. RILEY, RAY C. WAKEFIELD AND LEON O. UTSELL, AS MEMBERS OF AND CONSTITUTING THE RAIL-D COMMISSION OF THE STATE OF CALIFORNIA.

ROAD COMMISSION OF THE STATE OF CALI-

STATEMENT AS TO JURISDICTION.

MAX THELEN,
B. R. AIKEN,
Counsel for Appellant.



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Public Utilities Act of California (St. 1915, ch. 91, p.
115, as amended), particularly as amended by the
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(Section 67—St. 1915, ch. 91, pp. 115, 161)

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1938

# No. 704

AMERICAN TOLL BRIDGE COMPANY, A CORPORATION,
Appellant,

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, AS MEMBERS OF AND CONSTITUTING THE RAILBOAD COMMISSION OF THE STATE OF CALIFORNIA,

Appellees.

STATEMENT OF APPELLANT RESPECTING JURIS-DICTION OF COURT TO REVIEW JUDGMENT IN-VOLVED HEREIN.

# MAY IT PLEASE THE COURT:

Pursuant to paragraph 1 of rule 12 of this Court, appellant presents the following statement as to the basis upon which this Court has jurisdiction to review the judgment of the Supreme Court of California involved herein:

### A.

# Statutory Provisions Sustaining Jurisdiction.

This is an appeal by American Toll Bridge Company (hereinafter called appellant) under Section 237(a) of the

Judicial Code, U.S. C. A., Title 28, Section 344 (as amended by the Act of February 13, 1925, ch. 229, Section 1, 43 Stat. 936) and under the Act of January 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466, from a final judgment in a suit in the highest court of the State, to-wit, the Supreme Court of the State of California, in which suit there was drawn in question the validity of a certain order, legislative in character, of the Railroad Commission of the State of California, on the ground that said order was repugnant to the Constitution of the United States, particularly the provision of Section 10 of Article I thereof providing, in part, that no State shall pass and law impairing the obligation of contracts and the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing, in part, that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

B.

# Order of Railroad Commission of California Validity of Which is Involved.

The order of the Railroad Commission of California was an order made and entered on February 8, 1938, Decision No. 30,612, reducing the tolls charged and collected by appellant from passengers and automobiles using appellant's Carquinez Bridge, a toll bridge constructed and operated across the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California.

Said Railroad Commission is a Commission created by Sections 22 and 23 of Article XII of the Constitution of California, as amended, respectively, on October 10, 1911 and November 3, 1914. By said Sections, the Legislature of California is authorized to confer additional powers upon the Railroad Commission and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of the Constitution of California (see Appendices No. 1 and No. 2).

Said Railroad Commission, in making its said order, acted under said provisions of the Constitution of California and claimed jurisdiction under the Public Utilities Act of California (St. 1915, ch. 91, p. 115, as amended) particularly as amended by the Act of July 1, 1937, St. 1937, ch. 36, pp. 2473, 2478, enlarging the term "public utility", as used in said Public Utilities Act, so as to include every toll bridge corporation (see Appendix No. 3). In so acting, the said Railroad Commission exercised delegated legislative authority.

Said order of said Railroad Commission was final and was legislative in character.

C.

# Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was made and entered on the 27th day of September, 1938.

The petition for appeal was presented by appellant and filed and the order allowing appeal was made and entered on the 28th day of October, 1938.

D.

# Nature of Case and Rulings of Court Showing Case is Within Jurisdictional Provisions Relied On.

The case before the Railroad Commission was instituted by the Commission by a notice or order directing that an investigation be instituted upon the Commission's own motion into the reasonableness of the rates, charges, contracts, classifications, rules and regulations, or any thereof, charged or enforced by American Toll Bridge Company in the operation of its said Carquinez Bridge. Neither com-

plaint nor answer were at any time filed, no issues were formulated and the Commission at no time prior to the decision advised appellant of its proposals.

After hearings, the Railroad Commission filed its opinion and order on February 8, 1938, Decision No. 30,612, reducing specified tolls, as aforesaid.

Following the filing of said opinion and order, appellant on the 17th day of February, 1938, filed with the Railrond Commission its fifty-five page printed petition for rehearing wherein appellant, specifically and in appropriate detail, drew in question the validity of the Commission's said order on the ground that the same violated the rights of appellant under Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said petition for rehearing was denied by the Railroad Commission on February 21, 1938 without opinion.

Thereafter, on February 25, 1938, appellant filed with the Supreme Court of the State of California its petition for a writ of review to review and annul said order. In said petition appellant set out the identical claims which it had set out in said petition for rehearing before the Railroad Commission, as to the invalidity of said order of the Railroad Commission by reason of violation of the rights of appellant under each of said provisions of the Constitution of the United States.

The Supreme Court of California granted said petition and a writ of review issued out of said court on the 6th day of April, 1938. Return was made by said Railroad Commission on the 15th day of April, 1938.

The proceedings in the Supreme Court of the State of California were original proceedings. They were authorized by Section 67 of the Public Utilities Act of said State, which Section of said Act provides that only the Supreme Court of California shall have jurisdiction to review, re-

verse, correct or annul any order or decision of said Commission (St. 1915, ch. 91, pp. 115, 161. See Appendix No. 4).

Thereupon said court refused to annul, but, on the contrary, on September 27, 1938, affirmed said order of the Railroad Commission and by its judgment entered on said September 27, 1938, held that said order was not repugnant to said Sections of the Constitution of the United States or any of them (for Opinion of Supreme Court of California, see Appendix No. 5).

Thereupon, on October 27, 1938, appellant filed in said court a petition for rehearing, wherein is drawn in question the validity of said order on each ground urged in said petition for rehearing before the Railroad Commission and in said petition for writ of review to be issued by said court, and particularly that said order is repugnant to the provisions of Section 10 of Article I of the Constitution of the United States and of Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said petition was denied on October 27, 1938.

The judgment of the Supreme Court of the State of California entered on September 27, 1938 was, by virtue of the provisions of said Section 67 of the Public Utilities Act of said State, a judgment in said suit in the highest court of the State of California in which a decision in said suit could be had and constitutes a final judgment of said court within the meaning of Section 237 (a) of the Judicial Code (U. S. C. A., Title 28, Section 344).

Whereupon, on October 28, 1938, appellant filed with the Supreme Court of California a petition for leave to appeal to this Court, together with its assignment of errors, in which petition appellant drew in question the validity of said order of the Railroad Commission as being repugnant to Section 10 of Article I of the Constitution of the United

States and Section 1 of the Fourteenth Amendment to the Constitution of the United States. In said assignment of errors, appellant charged error in said judgment and decision of said State court in holding and deciding in favor of the validity of said order as not being repugnant to said provisions of the Constitution of the United States or either of them. On said date the Chief Justice of the Supreme Court of the State of California made an order allowing the appeal.

Appellant will urge in this Court each point made in its said assignment of errors.

### E.

# Statement of Grounds Upon Which it is Contended That the Questions Involved are Substantial.

The questions involved go to the very heart of the Railroad Commission's order and of the procedure before the Railroad Commission.

In the most concise terms, the contentions of appellant with reference to said questions may be summarized as follows:

- 1. The Railroad Commission's order impairs the obligation of appellant's contract with the State of California, acting through the Board of Supervisors of the County of Contra Costa, under which contract the public authorities may not reduce the tolls originally fixed by the Board of Supervisors of Contra Costa County unless it appears that said tolls are yielding a net return in excess of 15% on the rate base established by Sections 2845 and 2846 of the Political Code of the State of California.
- 2. The Railroad Commission's order confiscates the property of appellant in said Carquinez Bridge and also in its Antioch Bridge, because the tolls fixed by the Railroad Commission will fail to yield a fair return on the fair value of the property.

The reduction which the Railroad Commission made in the tolls of the Carquinez Bridge will have the effect of reducing the gross revenue of the bridge from \$1,552,934.00 in 1937 to only \$1,143,520.00 in 1938, being a reduction of 26.4%. The reduction in the net revenue will be from \$963,816.00 in 1937 to \$570,298.00 in 1938, being a reduction of 40.8%.

3. The entire procedure before the Railroad Commission constitutes a denial of due process of law for each of the reasons specified in the assignment of errors, including, particularly, the reason that the case was instituted by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges and the inquiry was thereafter conducted without the formulation of any issues by the filing of answer or in any other way and the Railroad Commission failed to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, all in denial of the requirements of due process of law as most recently established by this Court in Morgan v. United States, 304 U. S. 1.

There are other questions involved, but it is believed that the above summary of the most important issues will be sufficient to show that the case is one in which the Federal questions involved are substantial in accordance with the decision of this Court in *Zucht* v. *King*, 260 U. S. 174, 176, 177, and numerous other cases.

F

Stage in Proceedings at Which, and Manner in Which, the Federal Questions Sought to be Reviewed Were Raised and Way in Which They Were Passed Upon by Court.

The Federal questions sought to be reviewed were first raised by appellant in said fifty-five page printed petition for rehearing which appellant filed with the Railroad Commission on February 17, 1938. In said petition, appellant urged, with appropriate particularity and in full detail, that said order of the Railroad Commission violated the rights of appellant under said Section 10 of Article I of the Constitution of the United States and said Section 1 of the Fourteenth Amendment to the Constitution of the United States. This was the first stage of the proceedings before the Railroad Commission at which said question could be raised. Said petition for rehearing will be part of the record herein.

The Railroad Commission having by order of February 21, 1938, denied said petition for rehearing, appellant, on the 25th day of February, 1938, filed with the Supreme Court of California its said petition for writ of review, in which petition appellant again set forth, in full detail, the respects in which said order of the Railroad Commission violated its rights under each of said Federal constitutional provisions. Said petition will be a part of the record herein

In its opening and closing briefs before the Supreme Court of California and in its oral argument before said Court on May 27, 1938, appellant again raised all of said contentions under each of said provisions of the Constitution of the United States.

In its decision of September 17, 1938, the Supreme Court of California expressly ruled on each of said contentions of appellant, with the exception of one hereinafter specified, and ruled that each of said contentions was without merit. The Supreme Court decided in favor of the validity of the Railroad Commission's said order in each respect in which appellant had contended and does now contend that said order is repugnant to Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States, except only that said court failed to pass on the contention of appellant (expressly made in its clos-

ing brief before the court) that the Railroad Commission was bound to follow the rule of rate making as to toll bridges established by the Legislature in Sections 2845 and 2846 of the Political Code of the State of California, even though the language of said Sections be regarded as the language of regulation and not of contract, for the reason that the Legislature of California has at no time changed or amended said rule of rate making thus established. The court failed to pass on appellant's claim that the failure of the Railroad Commission to follow said rule of rate making as to toll bridges constituted a denial to appellant of due process of law within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of California, in its said opinion and judgment, definitely ruled in favor of the validity of the order of the Railroad Commission in every other respect in which appellant had urged and does now urge that said order was and is repugnant to said Section 10 of Article I of the Constitution of the United States and said Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Appended hereto is a copy of the opinion which the Supreme Court of California delivered upon the rendering of the judgment sought to be reviewed (Appendix No. 5).

G

# Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Lake Erie & Western Railroad Company v. State Public Utilities Commission of Illino , 249 U. S. 422, 424; Bluefield Water Works & Improvement Company v. Public Service Commission of the State of West Virginia, 262 U. S. 679, 683; Northern Pacific Railway Company v. Department of Public Works of the State of Washington, 268 U.S. 39, 42;

Live Oak Water Users Association v. Railroad Commission of California, 269 U.S. 354, 356;

King Manufacturing Company v. City Council of Augusta, 277 U. S. 100, 114;

Sultan Railway & Timber Company v. Department of Labor and Industries of the State of Washington, 277 U.S. 135, 136;

Ex parte Williams, 277 U. S. 267, 272.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (ch. 229, 43 Stat. 936, Sec. 1, U. S. C. A., Title 28, Section 344), and under the Act of January 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466.

Respectfully submitted,

MAX THELEN,
B. R. AIKEN,
Attorneys for Appellant.

## APPENDICES.

- No. 1.—Constitution of the State of California, Art. XII, sec. 22 (Amendment adopted October 10, 1911).
- No. 2.—Constitution of the State of California, Art. XII, sec. 23 (Amendment adopted November 3, 1914).
- No. 3.—Act of July 1, 1937, St. 1937, ch. 896, pp. 2473, 2478.
- , No. 4.—Public Utilities Act, State of California, St. 1915, ch. 91, p. 115—Section 67.
- No. 5.—Opinion accompanying Judgment of Supreme Court of California.

## APPENDIX No. 1.

CONSTITUTION OF CALIFORNIA.

Article XII, Section 22.

There is hereby created a railroad commission which shall consist of five members and which shall be known as the railroad commission of the State of California. The commission shall be appointed by the governor from the state at large; provided, that the Legislature, in its discretion, may divide the state into districts for the purpose of such appointments, said districts to be as nearly equal in population as practicable; and, provided, further, that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the governor immediately after the adoption of this section, to hold offee during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur the governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Commissioners appointed for regular terms shall at the beginning of the term for which they are ap pointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices. The Legislature shall fix the salaries of the commissioners, but pending such action the salaries of the. commissioners, their officers and employees shall remain as now fixed by law. The Legislature shall have the power, by a two-thirds vote of all members elected to each house, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All of said commissioners shall be qualified electors of this state, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said railroad commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of railroad commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission ordered filed in its office shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission, than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all. railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

No provision of this constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the

railroad commission in this constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the "railroad commission act" of this state approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently here with. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein (Amendment adopted October 10, 1911.)

## APPENDIX No. 2.

CONSTITUTION OF CALIFORNIA.

Article XII, Section 23.

Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public

utilities shall likewise be subject to such control and regulation. The railroad commission shall have and exercise such nower and jurisdiction to supervise and regulate public ntilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution. From and after the passage by the Legislature of laws conferring powers upon the railroad commission, respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law; and provided, further, that where any such city and county, or incorporated city or town, shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the railroad commission in the manner prescribed by the Legislature; and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in

the manner prescribed by law. Nothing in this section shall be construed as a limitation upon any power conferred upon the railroad commission by any provision of this constitution now existing or adopted concurrently herewith (Amendment adopted November 3, 1914.)

# APPENDIX No. 3.

# Statutes of 1937, Ch. 896, pp. 2473, 2478.

Section 1. Section 2 of the Public Utilities Act is hereby amended to read as follows:

"SEC. 2. . . .

- "(dd) The term 'public utility,' when used in this act, includes every common carrier, toll bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.
- "(ee) The term 'toll-bridge corporation,' when used in this act, includes every private corporation or private person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any bridge or appurtenance thereto, used for the transportation of persons or property for compensation in this State."

# APPENDIX No. 4.

# Public Utilities Act.

(St. 1915, ch. 91, p. 15.)

# Section 67.

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of this State for

a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown the same be continued. No new or . additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings, and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as hereinafter provided; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this State relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the Supreme Court under the provisions of this section. No court of this State (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any

right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final. (Statutes 1933, Chapter 442.)

# APPENDIX No. 5.

Opinion Delivered by Supreme Court of California Upon Rendering of Judgment of September 27, 1938.

S. F. No. 16006. In Bank. September 27, 1938.

AMERICAN TOLL BRIDGE COMPANY (a Corporation), Petitioner,

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RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California, Respondents.

Proceeding to review an order of the Railroad Commission reducing the tolls for automobiles and passengers over a toll bridge. Affirmed.

For Petitioner: Thelen & Martin, Max Thelen; Dunn. White & Aiken, B. R. Aiken, Bauer E. Kramer; Burpee & Robinson; Harold C. Holmes, Jr.

Amici Curiae: C. C. Carleton, Chief Counsel, Department of Public Works; C. R. Montgomery, Attorney, Department of Public Works.

For Respondents: Ira H. Rowell, Roderick B. Cassidy, George E. Howard.

By the Court:

The purpose of this proceeding is to review an order of the Railroad Commission reducing the tolls for automobiles and passengers over the Carquinez bridge. The main question is whether the rates so fixed are so low as to be confiscatory. Other questions also require determination.

On February 5, 1923, the board of supervisors of Contra Costa county granted to the Rodeo-Vallejo Ferry Company a twenty-five year franchise to construct and operate the Carquinez bridge across Carquinez straits between Crockett in Contra Costa county and Valona in Solano county. On June 4, 1923, the same board of supervisors granted to Delta Bridge Corporation a twenty-five year franchise to construct and operate a bridge across the San Joaquin river near Antioch, between the counties of Contra Costa and Sacramento. Both franchises expire in 1948, at which time the property rights and title in and to the bridges revert to the adjacent counties without the payment of compensation to the franchise holders.

Those in control of the Rodeo-Vallejo Ferry Company organized the American Toll Bridge Company which became the owner of the Carquinez bridge franchise on July 2, 1923. That company also acquired the franchise to construct and operate the Antioch bridge as well as all of the outstanding stock of the Rodeo-Vallejo Ferry Company and of the Martinez-Benicia Ferry and Transportation Company which operates ferries between Martinez and Benicia. The Antioch bridge was opened to traffic in January, 1926, and the Carquinez bridge in May, 1927. The Antioch bridge crosses the stream at a point 25 miles above and east of the Carquinez bridge. Between the two bridges, about eight miles east of the Carquinez bridge Company ply between the two shores.

The power and duty of granting authority to construct and operate a toll bridge over water dividing two counties and to fix the tolls to be collected for the use thereof formerly resided in the board of supervisors of the county situate on the left bank descending the stream or arm of the bay. (Pol. Code. secs. 2843, 2845.) The board of supervisors of Contra Costa county, at the beginning of operations of the Carquinez bridge, fixed the tolls for automobiles at sixty cents and ten cents for passengers in vehicles

or on foot. The bridge was in operation at this scale of tolls at the time of the reduction ordered by the commission.

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By Statutes of 1937, page 2473, the jurisdiction of tall bridges was transferred to the Railroad Commission. On August 27, 1937, the commission on its own motion commenced in one proceeding the investigation of the tolls and affairs of all toll bridges which thus had come under its jurisdiction, including the Carquinez, the Antioch, the San Mateo and the Dumbarton bridges. Subsequently, on October 4, 1937, in a separate proceeding, the commission ordered an independent investigation into the reasonableness of the tolls charged upon the Carquinez bridge alone. After hearings and on February 8, 1938, the commission rendered its opinion and order establishing the tolls for automobiles at forty-five cents and five cents for each passenger in vehicles or on foot. The validity of this order is here called into question.

Notice is first taken of the contentions with respect to the scope of the review herein. In 1933 the legislature added the following paragraph to section 67 of the Public Utilities Act (Stats. 1933, p. 1157), referring to orders and decisions of the Railroad Commission: "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final." Otherwise the findings on questions of fact remained final.

The petitioner invokes section 1 of article IV and paragraph 1, section 10, article 1, of the United States Constitution. It contends that this court's independent judgment as to all probative facts in the record must be exercised in determining whether the constitutional sections have been violated, and that the exercise of such independent judgment will disclose the confiscatory nature of the tolls fixed by the commission.

This court has heretofore recognized that the enactment of the quoted provision in section 67 of the Public Utilities Act afforded an answer to the often repeated contention or criticism in the state and federal courts, with special reference to the case of Ohio Valley Water Co. v. Ben Aron Borough, 253 U. S. 287, that legislation providing for reguation of public utilities should accord a complaining party an opportunity to obtain in a judicial tribunal an independent review of the law and the facts when the order or lecision of the commission is challenged on federal constiutional grounds. (Southern California Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 744.) It was our conclusion in that case that the "amendment did not, in any substantial degree, change the rules in force prior thereto. The law of the state, both constitutional and statutory, efore 1933 and as construed by this court, was at pains to preserve to the complaining party the right to challenge in his court any order or decision of the commission on fedral constitutional grounds when, of course, such challenge ould appropriately be made in the proceeding," and that n answer to such challenge included an independent conideration of both the law and the facts "evon though the order of the court be a denial of an application for review". We there cited numerous cases wherein this court, prior to 933, decided that neither the provision of section, 67 which nakes findings and conclusions of the commission on quesions of fact final and not subject to review, nor the nature f the review proceeding, precluded an independent invesigation into the facts when federal constitutional objecions were available to the complaining party, regardless f whether the action of the commission was quasi-judicial, r legislative as in the fixing of rates. The scope of the adicial review as bearing upon the question of the court's dependent judgment in connection with the rate-making ower within constitutional restraints was stated in St. oseph Stock Yards Co. v. United States, 298 U. S. 38, 0-54, as follows:

"The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legis-

lative authority and action which transcends the limits of legislative power. Exercising its rate-making at thority, the legislature has a broad discretion. It may exercise that authority directly, or through the agence it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. \* \* (Citing cases.) \* \* ' When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to acc within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such a agency, are met, as in according a fair hearing and act ing upon evidence and not arbitrarily \* \* \* (Citing • • In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the ques tion of the weight of the evidence in determining is sues of fact lies with the legislative agency acting within its statutory authority.

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property with out due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicia scrutiny and determination in order to prevent th transgression of these limits of power. The legislatur cannot preclude that scrutiny and determination by an declaration or legislative finding. Legislative declaration tion or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. \* \* But this judicial duty to exercise an independent judg ment does not require or justify disregard of the weigh which may properly attach to findings upon learing an

evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgmer, may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative. action rests. We have said that 'in a question of ratemaking there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing': (Darnell v. Edwards, 244 U.S. 564, 569.) The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. (Los Angeles Gas Corp. v. Railroad Commission, 289 U. S. 287, 305; Lindheimer v. Illinois Telephone Co., 292 U.S. 151, 169; Dayton Power & Light Co. v. Public Utilities Commission, 292 U.S. 290, 298.) \* \* It follows, in the application of this principle, that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne."

And from Los Angeles Gas Co. v. Railroad Commission, 289 U. S. 287, 304, we quote: "We do not sit as a board of revision, but to enforce constitutional rights. (San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446.) The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing

the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are my transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the court may not interfere with the exercise of the state's authority unless confiscation is clearly established." The court there also referred to Minnesota Rate Cases, 230 U.S. 352, 452, quoting at page 307: "It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases."

The first constitutional objection advanced by the petitioner is that the reduction of the prevailing rates is an impairment of the contract obligation between the countrol Contra Costa and the petitioner. It bases its contention on the provisions of section 2845, subdivision 3, and section 2846 of the Political Code, and its claim that the provisions of those sections were a part of the contract between the grantor and grantee of the franchise. Subdivision 3 of section 2845, as it read at the time the franchise was granted required that the hoard of supervisors granting authority to construct a toll bridge must at the same time, "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of construction or erection and maintenanec of the bridge or ferry for the first year, nor on the fair cash value together with repairs and maintenance thereof for any succeeding year." Section 2846. enacted in 1872, reads:

"The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years at any time, unless it is shown to the satisfaction of the Board of Supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry.

The petitioner construes the provisions of the foregoing sections, read together, as securing it against a reduction of the tolls during the specified period unless its net annual revenue exceeds fifteen per cent of the fair cash value. It may fairly be assumed from the evidence that the income in any year, after all deductions, has not equalled the designated fifteen per cent. Meritin the petitioner's contention depends, however, on the propriety of reading into the language of the sections an intent on the part of the legislature to declare that receipts from tolls which return a net annual income of fifteen per cent "is not disproportionate" to the "fair cash value", and that it intended to encourage the investment of funds by guaranteeing such a return. construction, however, fails to give full import to the language of the section which prohibits either an increase or a reduction in the tolls unless the receipts are shown to be disproportionate. The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with and intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much. Rather is it to be assumed that the legislature intended, not only to afford an adequate and proportionate return to the grantee, but that it also intended some measure of protection to the public's right to be charged not more than a reasonable toll for the use of the bridge: Toll bridges in this state have been subject to legislative control since 1854. (Newsom v. Board of Supervisors, 205 Cal. 262, In 1872, when section 2846 was enacted by the legislature, sufficient scope was allowed between both interests, public and private, to permit adequate elasticity in the exercise of the legislative rate-making function in the light of prevailing economic conditions. Such a statute does not savor of a contract obligation to the grantee. Its object was to delegate to and vest in the designated body the power

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to regulate tolls as circumscribed by the stated limitation. The courts have recognized that this was, and that the creation of a contract obligation was not, the purpose and object of such statutes. Of a statutory provision permitting participation in the rate-making function by two representatives on the board of commissioners of the Spring Valley Water Company selected at the time of incorporation (later changed by section 1, article XIV of the Constitution vesting the rate-making power in the board of supervisors), it was said: "These things are not of the contract, they appertain to the sovereignty of the state, and can not be bargained away," citing Munn v. Illinois, 94 U. S. 126.

The retention by the state of the power to regulate tolls was sustained where the statute involved provided for legislative reservation to reduce the road tolls when it. should appear that they produced an annual net dividend in excess of fourteen per cent, "so that it shall give that amount of net dividends per annum, and no more", and where by subsequent legislation rates which would produce a return less than that were specified. (Covington and Lexington Turnpike Co. v. Sandford, 164 U. S. 578.) The court supported its conclusion by the application of the principles relating to tax immunity statutes, including the doctrine that "all doubts upon the question must be resolved in favor of the public". It said: "The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation." The court thereupon declared it to be the intention to pass to the new corporation, as successors of the original corporation, only the necessary powers, rights and capacities, and not any exemption from legitimate and ordinary legislative control. The same priniple was later stated in the case of Railroad Commission v. los Angeles, 280 U.S. 145, 152, as follows: "The delegaion of authority to give up or suspend the power of rate egulation will not be found more readily than would an ntention on the part of the State to authorize the bargainng away of its power to tax \* \* \*" (Citing cases.) The rinciple is applicable in the present case to support the onclusion that the legislature did not create an immunity r exemption from the appropriate legislative control. Any uch ambiguity is resolved in favor of the retention of the ower to regulate. (Freeport Water Company v. Freeport ity, 180 U. S. 587, 599; Stanislaus County v. San Joaquin . & I. Co., 192 U. S. 201.) In the last cited case a statute f 1862 provided for water rates which should "not be reuced by the supervisors so low as to yield to the stockolders less than one and one-half per cent per month upon ne capital actually invested". A statute of 1885 changed ne figure so that the net annual receipts should "be no ss than six nor more than eighteen per cent" upon the alue of the property actually used and useful to the busiess of furnishing water. The Supreme Court held that the atute of 1862 did not amount to a contract, and that the ate had by section 31 of article IV (now article XII, sec. , of its Constitution reserved the power subsequently to ter the authority vested by the earlier statute. It said at "as the contract, if it existed, would take away from e legislature its otherwise undoubted right of regulation oon a subject of great public importance, there is still less ason for implying a contract which would prevent the ate from using its power to that end in the future". The foregoing discloses the inapplicability of certain desions relied on by the petitioner, such as Detroit v. Detroit itizen's St. Ry. Co., 184 U.S. 368, wherein the court recog-

sions relied on by the petitioner, such as Detroit v. Detroit vizen's St. Ry. Co., 184 U. S. 368, wherein the court recogzed the competency of a state legislature in the absence constitutional prohibition, to authorize a municipal correction to make a binding contract as to rates of fare with street railway company, as distinguished from a mere degation of authority to regulate. Such cases would not stify a conclusion in the present case that the provisions the statute herein amount to an irrevocable contract for minimum annual percentage of return to the petitioner.

The power to contract, or the existence of a contract in such case as distinguished from regulation, must be so clears to be susceptible of no other construction. (Home Telephone Ca. v. Los Angeles, 211 U. S. 265.) This disposes of the petitioner's contention that the provisions of the statute with reference to tolls became a part of the franchise cotract, or of any imputation that, as part of the contract, the are subject to any construction which includes a relinquish ment of the power of regulation. By a parity of reasoning and pursuant to the foregoing cited decisions, the provision of the statute may not be regarded as a contract that the rate making power will always be vested in the board of supervisors. The reservation of the power to repeal or alter the the law (Const. art. IV, sec. 31, now art. XII, sec. 1), has been held to enter into the contract with the corporation (Stanislaus County v. San Joaquin C. & I. Co., supra, p. 211; Spring Valley Water Works v. Board of Supervisors. 61 Cal. 2, 5; Spring Valley Water Works v. Schottler. 18 U. S. 347.)

The petitioner urges that the Carquinez and Antioch bridges serve the same territory and must be considered as integral parts of a single transportation system; there fore, that the commission exceeded its jurisdiction in prosecuting an investigation into and making its order and decision referable to the Carquinez bridge alone. tioner concedes that the bridges are to some degree competitive, and says that a reduction in the tolls of the Carquinez bridge will compel a reduction to the same level in the tolls of the Antioch bridge, as well as a reduction below that level of the tolls on the ferry line, which like wise is competitive. The fact that the bridges are competitive, together with a consideration of all the other relevant facts appearing, may be said to have justified the commission in concluding that they are not integrated into a single transportation system and that neither is used or useful in any service performed by the other. Bridge Company purchased and operated the competitive factors for the obvious purpose of reducing competition, and it has undoubtedly succeeded in accomplishing that end It cannot expect more. In other words, it cannot hope, by

purchasing nonmoney-making enterprises for the purpose of controlling competition, also to restrict the power of regulation in its own interests exclusively. The public interest as well as that of the corporation controlling the public toll highway must receive proper consideration. (Covington & Lexington Turnpike Road Co. v. Sandford, supra, 596-597.) There is no established precedent or authority presented by the petitioner which calls for a declaration that under the facts of this case the Railroad Commission was compelled to treat the two bridges as integrated units. On the contrary it has been held that less than the whole property owned by a public utility may be fixed as the appropriate unit for rate-making purposes. (Wabash Valley Elec. Co. v. Young, 287 U. S. 488; Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159.) The fact that the petitioner herein from the beginning of its operations kept but one set of books covering all transactions perfaining to both bridges does not conclude the matter in favor of its contention. The fact appeared in the Gilchrist case that the subway and elevated lines were treated in the accounts of the lessee of both lines as separate units. But that distinction would not justify the view that, had it appeared that they were treated as one unit, the conclusion would have been different. (See, also, International Ry. Co. v. Prendergast, 1 Fed. Supp. 623, citing additional authorities at page 626.) The condition existing in this case, namely, that neither the Carquinez bridge nor the Antioch bride is to any degree used or useful in the public utility service and operation of the other, distinguishes it from the case of Coney v. Broad River Power Company, 171 S. C. 377, 172 S. E. 437, relied upon by the petitioner. There the decision was that the commission in computing a rate base for tolls to be charged by the power company for furnishing electric energy, could not exclude from consideration the properties of the street railway system owned and operated by it. But that conclusion specifically depended on the fact there appearing that the functions were related and that all the properties were used or useful in the company's business of generating electricity and in its related business.

To what extent the single ownership of such competing units subserves the public welfare and protects the corelative rights and interests of the franchise holders and the public, is a question primarily for the commission to decide. Unless its decision has been unreasonable or artitrary and may therefore be said to violate a constitutional right of the petitioner, the conclusion of the commission should not be disturbed. We find no departure from the recognized precepts upon which the petitioner may rely in the conclusion of the commission that the petitioner is not entitled to have the investment and operating expense of both bridges included in the rate base upon which to compute a toll for Carquinez bridge.

The next contention for discussion is that the rate ordered

by the commission is confiscatory.

The opinion and order of the commission is dated February 8, 1938. It indicates that the commission was well-aware of and considered the fact that the life of the franchise and the control of the properties will terminate in 1948 without compensation to the franchise holder, and that the operating properties must therefore be treated as a "wasting asset". It also appears that in fixing the tolls for the traffic over Carquinez bridge consideration was "given to the effect of such rates on the company as a whole".

The Toll Bridge Company was organized under the laws of Delaware in May, 1923, with a capital stock of \$5,000,000, which was transferred to a holding company having a similar name. In 1925 it incurred a bonded debt of \$4,500,000 of first mortgage seven per cent bonds and \$2,000,000 of second mortgage eight per cent bonds maturing in 1945. By the middle of 1935 it had reduced its capital stock to \$3,719,593 plus \$57,280 subject to reissue for contingencies, and had reduced its bonded indebtedness to \$4,180,000. At that time it called in its outstanding bonds and effected a refunding thereof through an issue of \$4,300,000 first mortgage bonds at five and one-half per cent (including the expense of the call and reissue), the principal of which in turn was reduced to \$2,491,500 by October 31, 1937. The commission found that the company's accounts showed that

the actual investment in the Carquinez bridge structure, exclusive of lands, amounted to \$7,863,451, which, with land \$66,835, and furniture and fixtures, \$19,668, amounted to a total of \$7,949,954. The company's earnings have been sufficient to enable it to set up a reserve for depreciation of \$2,748,443 (accumulated on the six per cent sinking fund method based on operating life under the franchise designed to return the investment upon the termination of that period), and additional reserved of \$1,055,313; and to accumulate a surplus which on October 31, 1937, amounted to \$419,123.

The testimony of the witnesses varied as to the estimated reasonable cost of the structure, and cost to reproduce new. The various estimates as summarized in the findings

and opinion of the commission are the following:

	Book cost of bridge structure (Commis-	
	sion's witness Coleman)	\$7,863,451
	Estimated reasonable cost of construction	
	(Commission's witness Mitchell)	6,877,318
	Cost to reproduce new (Commission's wit-	Way 15
	ness Mitchell)	6,340,844
	Original cost (Company's witnesses Gerwick and Ready):	
	Bridge structure \$7,863,451	
	Land	
	Furniture and fixtures 19,668	7,949,954
	Adjusted original cost (Gerwick and	1
	Ready)	8,332,622
	Reasonable historical cost (Gerwick and	
	Ready)	8,139,307
	Reproduction cost new (Gerwick and	
•	Ready)	8,743,231

After consideration of all the figures presented, the commission adopted the reported original cost, namely, \$7,949,-954, as the reasonable rate base. The estimated percentage of future annual net return was computed on the assumption that the reduction in the toll would be to a flat rate of fifty cents for each car including five passengers, and five cents for additional passengers, which was the rate charged

on the San Francisco-Oakland bay bridge. The commis found that that rate, computed on the probable increase traffic induced by the rate reduction, would produce and net receipts amounting to approximately seven and a half per cent on the adopted base. It said: "A reducin in rates will stimulate the traffic over the bridge, althou the extent, of course, cannot be estimated with exacting The results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure. When tested upon the bases usually is lowed by the commission such a rate of return is reasonable for this particular company, considering the unusual a cumstances under which its properties were constructed and have been and are operated. However, for the time being, in order that the company may be assured of fine cial stability and to guard against possible inaccuracie the estimate of induced traffic, by reason of rate reductions. a rate slightly higher than that proposed should be authoized." Thereupon the rate of 45 cents per car and five cents for each passenger was designated by its order. The commission expressly reserved jurisdiction to "reopen this proceeding when experience has developed further data # traffic moving over the bridge under the proposed rates", and to adjust freight and other rates which were not tok deemed approved.

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It appears in the record that the following percentage of net income had been earned by the company during the

preceding eleven years:

	Year.		2	,	,												Capital.	Per Cesi Return
	1927																\$7,106,337	8.62
	1928																7,365,297	6.82
	1929							 							-		7,544,361	8.20 -
	1930				4			 									7,777,981	9.50
	1931	•										=					7,946,753	8.18
-	1932							 	 								7,954,819	6.42
	1933										8						7,950,995	5.86
	1934				*	-	8	 									7,946,464	6.84
	1935						*	 								 	7,946,068	7.42
	1936				•			 		4		4					7,947,411	10.89
1	1937							 -	 -								7,947.537	12.12
	1		-													16		

percentage of return, as well as the estimated future percentage of return estimated by the commission, do include and are not the source of the accumulated reses for the repayment of the full investment by the end be franchise term. Those rates of return are in addition to the amounts set aside for the return of investment, represent the investor's annual reward for the use of

tal.

the petitioner urges that account should have been taken
the fact that prior to 1935 the company paid no stock
the fact that prior to 1935 the company paid no stock
the fact that a rate should have been fixed which
the denable the company to earn sufficient to return to the
the company to earn sufficient to return to the
the cholders dividends undeclared and assertedly unearned
the past. But past deficits may not be included in the
putation of the base for toll regulating purposes.
The chiefic in the past do not afford a legal basis for invaliting rates, otherwise compensatory, any more than past
fits can be used to sustain confiscatory rates for the
tre. (Board of Commissioners v. New York Telephone
(271 U. S. 23, 31, 32.)" (Los Angeles Gas Co. v. Raild Comm., 289 U. S. 287, 313. See, also, International

Co.v. Prendergast, 1 Fed. Supp. 623, 630.) he petitioner does not dispute the reasonableness in pting the reported original cost as a rate base, nor the rectness of the commission's finding as to the amount reof except that it contends that two items estimated by hould have been included or added thereto, namely, an wance for cost of developing the business, or going conn value; and an allowance representing additional cost nterest during construction. The petitioner states that commission allowed the reported actual expenditure of 8,092.56, and no more, as interest during construction; t capital funds in the sum of \$1,377,522 derived from ck sales and advances by Rodeo-Vallejo Ferry Comny, were expended for construction purposes prior to the e when the bond money became available, and that the erest item should be increased to \$1,070,761. It is theree contended that the sum of \$382,688 should be added to adopted rate base as partial cost of money during conuction, although at the same time it is conceded that the

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petitioner's accounts do not show the actual expenditu

The petitioner computes the going concern value a \$300,000, which it also contends should be added to the nabase figure of \$7,949,954. It arrives at that estimate in fixing nine per cent as the cost of money, and taking "fix the first five years of operation the very low figure of the deficiency of the income of the Carquinez bridge below to 9% cost of money shown by the evidence, with interest, the result is the sum of approximately \$300,000.00" which represents "5% of the cost of reproducing new the physical property, before consideration is given to overhead and is most reasonable under any accepted standard".

The addition to the rate base of these claimed omitted allowances produces a total of \$8,632,622, which the company proffers as the correct rate base. The petitions urges that the estimated future net income from Carquing bridge traffic will return but 6.6 per cent to the stockholder, computed on the adjusted base, which, it argues, considering all the factors and elements which have made the rist adventurous, not to say hazardous, is so low as to be confiscatory. One of the elements relied upon is the alleged higher cost of money to the company, which it places between nine and ten per cent. It urges that the net annual return should be equal at least to that cost.

The items for going concern value and additional money cost during construction are not shown, nor claimed, to have been actually incurred or expended, but are hypothetical allowances, and perhaps adjustable for acceptance and inclusion in estimates representing reproduction cost new. It is stated in the commission's opinion that "the book figure includes certain expenditures for organization, purposes whose reasonableness might well be questioned". In adopting the rate base those expenditures were nevertheless permitted to remain. Under any method of computation which the commission might pursue based on the various estimates before it, it does not appear that it would have arrived at a higher figure, even including appropriately adjusted allowances for the hypothetical costs claimed by the petitioner. The petitioner has not shown any error

r arbitrary action on the part of the commission in not dding to the base figure the two hypothetical costs. The mmission has therefore allowed all that could be required it in respect to those items. (Cf. Wabash Valley Elec.

o. v. Young, 287 U. S. 488, 500.)

In connection with the claimed item for going concern alue, we should also note that there was not here encounred the complexity of starting a new utility whose service as the sale and distribution of a commodity, such as elecical energy, gas or water, which required the intricate plancing of innumerable costs in many departments in rder to become established as a going concern. Compared the services performed by such utilities the establishent of the operation of a toll bridge may be considered a irly simplified task. The commission was fully justified concluding that there existed here no such impressive aturecinfluencing the intangible element of value known going concern as were referred to or enumerated in cases elied upon by the petitioner (see McCardle v. Indianapolis o., 272 U. S. 400; Los Angeles Gas Co. v. Railroad Comission, 289 U. S. 287, 313; International Ry. Co. v. Prenergast, 1 Fed. Supp. 623, 629), and that that element of due was given complete recognition by adopting the commy's own record of the actual cost thereof. The commison's finding on this item is fully supported by Dayton ower & Light Co. v. Public Utilities Commission of Ohio, 2 U. S. 290, wherein the court recognized that "going due is not something to be read into every balance sheet a perfunctory addition. 'It calls for consideration of e history and circumstances of the particular enterise' . . '', citing Los Angeles Gas and Elec. Corp. v. ailroad Commission of California, supra, at page 314. ontinuing the court said: "Here the company was a small e and its organization simple. There was no diversified d complex business with ramifying subdivisions. We cant in fairness say that after valuing the assets upon the sis of a plan in successful operation, there was left an ement of going value to be added to the total. Even if e addition might have been made without departure from cepted principles, the omission to make it does not apar to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. It is necessary again, in this relation, to distinguish between the legislative and judicial functions. (Los Angeles can supra, p. 314). Much that the framers of a schedule are liberty to do, this court in the exercise of its supervisor jurisdiction may not require them to do. For the legislative process, at least equally with the judicial, there is a indeterminate penumbra within which choice is most trolled."

Further sustaining authority is found in Columbus 6u & Fuel Co. v. Public Utilities Commission of Ohio, 292 U.S 398, 411-413, wherein objection to a disallowance of a going concern value was rejected when it appeared that such actual cost was nominal because of absence of copetition and had actually been included as part of the cost

of operation.

The historical hazards and risks stressed by the pettioner were unquestionably taken into consideration by the commission and are reflected in the rate base adopted. The special "wasting asset" character of the physical properties was also duly considered, and in computing the net at nual receipts, allowances were made for depreciation reserves, including amortization of the entire investment be fore the expiration of the franchise period. Volume of traffic and consequently net returns have been increasing and tending steadily upward since 1933 and undoubtedly will continue to do so because of the increase in the traffic dw to the operation of the bay bridge. It is therefore ap parent that the commission has given due weight and comsideration to all relevant facts and criteria in arriving a a proper base upon which it estimated the probable future net return. Considering the company "as, a whole", with all the particular elements and factors bearing upon the question, we conclude that the method adopted by the commission in arriving at the value of the property for rate regulatory purposes is not shown to have been unlawful And taking into consideration all of the factors which in fluenced the decision of the commission, as disclosed by the record, it cannot be said that adequate return has not been afforded to the petitioner.

Nor are we persuaded that the petitioner is entitled as a matter of right to a percentage of net return equal to what it claims is the cost of money to it. The stated percentage of money cost might historically be considered correct, but it relates to a period antedating 1936 when the company's bonded indebtedness was refunded. Here again, however, the petitioner may not be sustained in its claim of right to recoup past losses or expenses in its financing experiences. A glance at the figures of the present bond issue, the principal of which includes the expenses incurred in calling in the original issue and in issuing the new bonds, sufficiently indicates that the percentage claimed is not the measure of today's needs.

If time and experience prove that the expectations of the commission based on the percentage of anticipated increase in traffic induced by the reduction in rates, as computed by witnesses, fall short of realization, the petitioner will still be protected by an adjustment to be effected by the commission in the exercise of its reserved jurisdiction.

The petitioner claims that the commission erred in computing the net revenue upon which it estimated the percentage of return. The only claimed error in this computation is the allowance by the commission of income taxes on an accrual basis, rather than on the basis of actual expenditure in the base year. The contention is that the commission should have deducted income taxes, computed not on the income for the corresponding year, but on the income for the preceding year, on the theory that allowance should be made for the amount which is paid in the base year, rather than the amount accrued against the income of that year. We know of no practice or precedent in rate regulation which supports the theory of the petitioner, and it has presented none. We perceive no error in the method of accounting which treats the income tax item on an accrual basis for the purpose of arriving at net income for rate regulatory purposes.

The petitioner finally urges that the commission's findings, its conduct of the hearing, and the making of the order were not in accord with the principles of due process as

reiterated and applied in the recent case of Morgan t United States, 58 Sup. Ct. Rep. 773. In this connection it specifies that the separation of the properties of the Car quinez and Antioch bridges for rate regulatory purpose is against the "rudimentary requirements of fair play" and does not supply "those fundamental requirements of firness which are the essence of due process in a proceedings a judicial nature"; mentioned in that case. The preceding discussion we think fully answers those contentions Nothing appears which justifies a conclusion that all these sentials of a full and fair hearing before the Railroad Commission were not accorded the petitioner in compliance with the requirements of the constitutional mandate. The indings of fact, while not given numerical segregation, are stated with sufficient fullness in the opinion of the commission to apprise the parties and this court of all the facts supporting the commission's decision. Opportunity to examine and object to proposed findings before the decision was rendered was not essential. The number and complexity of findings, a lack of opportunity to examine which in the Morgan case evoked criticism, were not here present The petitioner made its objections in a petition for rehearing filed with the commission, which was denied.

The rest of the petitioner's specified particulars of omission or commission in the matter of the procedure and conduct of the hearing before the commission relate to the procedure of defining the issues upon which evidence was received. It is not contended that the petitioner was not fairly informed of what the issues were to be or that the issues were not clearly defined and understood by all parties concerned during the course of the hearing. As stated in the still more recent case of National Labor Relations Board v. Mackay Radio and Telegraph Company, 58 Sup. Ct. Rep. 904, at 913, "as no other detriment or disadvantage is claimed to have ensued from the board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288". On its denial of a petition for rehearing in Morgan v. United States, 58 Sup. Ct. Rep. 773, 58 Sup. Ct. Rep. 999, the Supreme Court again adverted to the distinction thus made in the Mackey Radio case. We conclude that the procedure followed in the present matter has not infringed upon the rights of the petitioner vouchsafed to it by the state and federal Constitutions.

The order of the commission is affirmed. The order of this court directing a stay pending determination in this

proceeding is discharged.





## In the Supreme Court of the United States

OCTOBER TERM, 1938.

AMERICAN TOLL BRIDGE COMPANY, a corporation,

Appellant,

VS.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and constituting the Railroad Commission of the State of California,

Appellees.

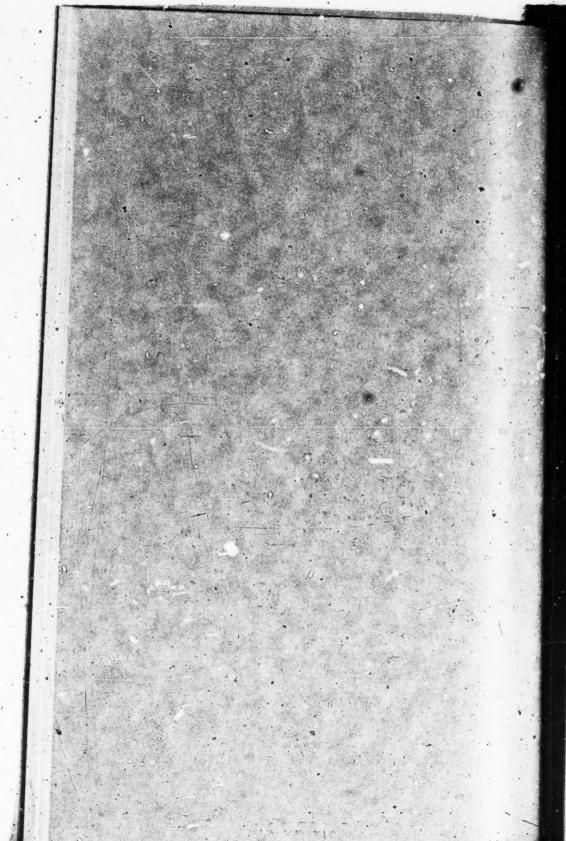
Brief of Appellant In Opposition to Motion to Dismiss or Affirm

MAX THELEN,

San Francisco. California,

Attorney for American Toll Bridge Company, Appellant.

DATED: November 30, 1938.



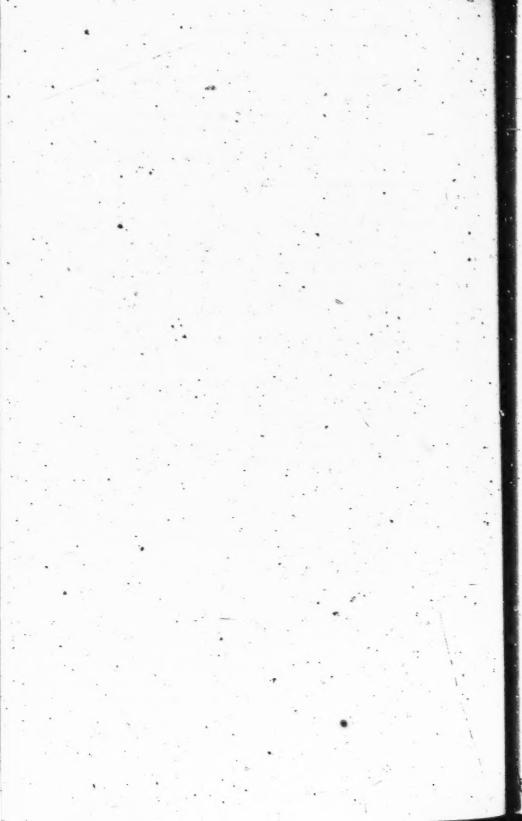
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# In the Supreme Court of the United States

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RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and constituting the Railroad Commission of the State of California,

Appellees.

#### Brief of Appellant In Opposition to Motion to Dismiss or Affirm

This brief is being filed pursuant to Rule 7, Paragraph 3, of the Rules of this Court, in opposition to a motion to dismiss or affirm contained in a typewritten document entitled "Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm" filed

by appellees with the clerk of the Supreme Court of California on November 12, 1938.

The sole ground of said motion is the claim that not one of the various important Federal questions at issue herein under Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States constitutes a "substantial" Federal question.

No authority is cited in support of this claim as to all or even any one of the various Federal questions at issue on this appeal. Only slight analysis will we believe, be sufficient to show that there is no merit in the motion.

The opinion of the Supreme Court of California appears, in pamphlet form, in 96 Cal. Dec. 367.

#### 1. THE STATUTE OF THE STATE

As appears from "Statement of Appellant Respecting Jurisdiction of Court to Review Judgment Involved Herein", this is an appeal by American Toll Bridge Company from a judgment of the highest court of the State of California, to-wit, the Supreme Court of the State of California, rendered in a suit in which there was drawn in question the validity of a certain order, legislative in character, of the Railroad Commission of the State of California, on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of

the validity of said order (See Appellant's Statement, Sections A and B and copy of Opinion of Supreme Court of California attached to said Statement as Appendix No. 5).

As required by Rule 12, Paragraph 1 of the Rules of Court, appellant's said Statement appropriately summarizes the pertinent provisions of said order. The first paragraph of Section B of appellant's said Statement reads as follows:

"The order of the Railroad Commission of California was an order made and entered on February 8, 1938, Decision No. 30,612, reducing the tolls charged and collected by appellant from passengers and automobiles using appellant's Carquinez Bridge, a toll bridge constructed and operated across the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California."

The exact wording of said order appears in appellant's Petition for Writ of Review filed with the Supreme Court of California, which Petition will be part of the Transcript of Record herein. The order refers to appellant's Carquinez Bridge tolls and reads as follows:

"Public hearings having been held in the above entitled matter and the Railroad Commission having given full and careful consideration to the record before it and being of the opinion that the present rates of American Toll Bridge Company, referred to in this order, are unjust and unreasonable insofar as they differ from the rates, herein prescribed which are hereby found to be just and reasonable rates, therefore,

"IT IS HERERY ORDERED that American Toll Bridge Company shall file with the Commission effective on and after March 1, 1938, a supplement to its tariff heretofore filed with the Commission on September 1, 1937 so as to change the items in its schedule of charges reading as follows:

"Passengers (7 years of age on foot or in vehicles	and	older)	
Auto only	***********	* **	
Passengers (7 years of age on foot or in vehicles	and	older)	OK.
Auto only	*	**************************************	45

"It Is Hereby Further Ordered that American Toll Bridge Company shall, on or before the 25th day of each month, file with the Commission a report showing its balance sheet as of the close of the preceding month, an income and profit and loss statement for the preceding month, together with a detailed statement of revenues and expenses, and a statement of the traffic moving over each bridge, segregated so as to show the number of automobiles, the number of passengers the number and classification of trucks, the together with the gross revenue from each class of traffic.

"IT IS HEREBY FURTHER ORDERED that unless otherwise directed, the order herein shall become effective twenty (20) days from the date hereof."

That such an order, legislative in character, is a "statute" within the meaning of Section 237(a) of the Judicial Code is, we believe, too firmly established

to justify anything further than a reference to some of the leading decisions of this Court cited by us in Section G of appellant's said Statement.

#### 2. FEDERAL QUESTIONS INVOLVED

Appellees' references to the Federal questions here involved are fragmentary and distinctly inaccurate.

In order that the Court may have before it a complete and accurate statement of the points urged by appellant in reliance on the Constitution of the United States, we shall quote the various Assignments of Error which appellant has filed with the Clerk of the Supreme Court of California. In connection with each assignment, we shall then state merely enough to show that the Federal question is "substantial", realizing that this is not the time nor the occasion to brief or argue the case on the merits.

#### ASSIGNMENT NO. 1

"1. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order establishing the tolls to be charged and collected by appellant for pedestrians and automobiles using appellant's Carquinez Bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, did not impair the obligation of the contract evidenced by Ordinance No. 1,71 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States."

Said Ordinance No. 171 of the Board of Supervisors of Contra Costa County, California, is the ordinance

which granted the right to construct and operate the Carquinez Bridge. Said ordinance will be part of the Transcript of Record herein. The Supreme Count of California heretofore decided that said ordinance and the acceptance thereof constitute a contract between the State of California, acting through said Board of Supervisors, and American Toll Bridge Company.

County of Contra Costa v. American Toll Bridge Company, 10 Cal.(2d) 359.

It is conceded that Sections 2845 and 2846 of the Political Code of the State of C lifornia are read into said contract and are a part thereof. Said Sections will be quoted in various documents in the Transcript of Record. They also appear in appellees' said Statement and are part of that Code of the State of California which is known as the Political Code.

Appellant insists that under said contract the public authorities may not reduce the tolls originally fixed by the Board of Supervisors of said Contra Costa County in the ordinance granting the franchise unless it appears that said tolls are yielding a return in excess of 15% on the rate base established by said Sections 2845 and 2846 of said Political Code.

The Railroad Commission has conceded and the Supreme Court of California found that the tolls from the Carquinez Bridge have never yielded and do not now yield a return anywhere near as much as 15% on said rate base. Nevertheless, the Railroad Commission made its order drastically reducing the existing tolls for the transportation of automobiles

and of passengers across the Carquinez Bridge in frank disregard of the contract on which the appellant relies, and the Supreme Court of California upheld the Railroad Commission in so doing.

The Railroad Commission has agreed that the words of said Sections 2845 and 2846 of the Political Code mean exactly what the appellant says they mean but the Commission disagreed as to the legal effect of said words.

As far as we can ascertain, no language such as that contained in the relevant portions of said contract has ever been before this Court.

Appellant is prepared to show, at the proper time, from said language and from the legislative history of the California statutes relating to the construction and operation of toll bridges, that the contract and the terms thereof are as claimed by appellant and that said order of the Railroad Commission impaired the obligations of that contract in violation of appellant's rights under Section 10 of Article I of the Constitution of the United States.

The only point made by appellees in their said. Statement, in support of the proposition that "the contract impairment question is not substantial" is that the Supreme Court of California construed the contract differently from the construction relied on by appellant (Appellees' typewritten Statement, pp. 5-6). No authority is cited in support of appellees' said contention and we know of none.

# MICROCARD TRADE MARK (R)

901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393













It is, of course, familiar learning that, while this Court will give consideration and weight to the view of the State's highest court, this Court is bound to decide for itself (a) whether a contract was made, (b) what are its terms and conditions and (c) whether the State has, by subsequent legislation, impaired the obligations of the contract. Some of this Court's most recent decisions to this effect are as follows:

New York Rapid Transit Corporation v. City of New York, 303 U. S. 573, 593;

Indiana v. Brand, 303 U. S. 95, 100;

United States Mortgage Co. v. Matthews, 28 U. S. 232, 236;

Coombes v. Getz, 285 U. S. 434, 441;

Larson v. South Dakota, 278 U. S. 429, 433;

Appleby v. City of New York, 271 U. S. 384.

Detroit United Railway v. Michigan, 242 U.S. 238, 249, 251.

The Court will not hesitate, where it appears to be necessary to reach a conclusion differing from that of the State court, to reverse the decision of the State court as to whether a contract exists, as to what are its terms and conditions, or as to whether the obligations of the contract are impaired by subsequent State legislation. Such reversals are found in the following cases, among others:

Indiana v. Brand, 303 U. S. 95; United States Mortgage Co. v. Matthews, 293 U. S. 232; Coombes v. Getz, 285 U. S. 434;

Appleby v. City of New York, 271 U. S. 364;

Georgia Railway & Power Company v. Town of Decatur, 262 U.S. 432;

Detroit United Ra lway, v. Michigan, 242 U.S. 238;

Terre Haute and Indianapolis Railroad Company v. Indiana, 194 U. S. 579;

Houston and Texas Central Railroad Company v. Texas, 177 U. S. 66;

Mobile and Ohio Railroad Company v. Tennessee, 153 U.S. 486;

Jefferson Branch Bank v. Skelly, 1 Black (66 U.S.) 436.

The independent examination to be made by this Court is just as applicable where part or all of the contract consists of a State statute which was construed by the State court as is the case where no statute is involved.

Indiana v. Brand, 303 U. S. 95, 100; Coombes v. Getz, 285 U. S. 434, 441;

Freeport Water Company v. Freeport City, 180 U. S. 587, 595, 610;

Walsh v. Columbus, Hocking Valley and Athens Railroad Company, 176 U. S. 469, 475; Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.) 436, 443,

Appellees (Typewritten Statement, p. 4) state that "appellant does not challenge the authority of the Railroad Commission to fix its tolls". Thus baildy

stated, an entirely erroneous impression as to appllant's position may be conveyed. Appellant's position on this point is as follows:

- 1. Assuming that the Legislature of California may provide for the regulation of toll bridges by the Railroad Commission, the Commission may only exercise that power subject to the rights of appellant under its franchise contract with the State of California. This question is one of the impairment of contract obligations.
- 2. Assuming that the Legislature of California may provide for the regulation of tall bridges by the Railroad Commission and has done so by the Act of July 1, 1937 (St. 1937, ch. 896, p. 2473 2478), the Legislature, nevertheless, left fully effective the specific standard of reasonablenes of rates of toll bridge companies established by the Legislature by the enactment of Sections 285 and 2846 of the Political Code, even though the language of those sections be regarded as the language of regulation as disfinguished from the language of contract. The failure of the Railroad Commission to follow said specific standard of reasonableness is a question of the denial of die process of law, which will hereinafter be further considered.

In either event, appellees' statement as to appellant's position is inaccurate and misleading.

Appellees' concluding paragraph under the heading of "Contract Impairment Question is not Substantial" reads as follows:

"It is equally clear that the construction given to the provisions of the Political Code by the Supreme Court of California reveals that the judgment from which the appeal has been taken was one based upon a non-federal ground adequate to support such judgment."

In this paragraph, appellees switch from the issue whether appellant's contention with reference to the impairment of contract obligations presents a substantial Federal question to the entirely different issue whether the construction given by the Supreme Court of California to the contract "was one based on a non-federal ground adequate to support such judgment".

No authority is eited by appellees in support of the latter contention.

The mere fact that the Supreme Court of California construed the statutory provisions which are a part of the contract, does not convert the issue from a Federal question to a non-Federal question.

Nor can it be said that the decision of the Supreme Court of California on the one issue of impairment of contract obligations is "ground adequate to support the judgment", as claimed by appellees, or is "sufficient to conclude the case" (For Film Corporation v. Muller, 296 U. S. 207, 210), where there are at least half a dozen other important Federal questions in the case, each of which is independent of and in addition to the issue of impairment of contract obligations.

We find nothing in the decision of the Supreme Court of California which in any way justifies the claim that said decision is based on any non-Federal ground.

We respectfully submit that the issue of impairment of contract obligations raises a substantial Federal question and that there is no foundation whatever for appellees' claim that the decision of the Supreme Court of California on that issue was one based on a non-Federal ground or that said decision on said issue alone is "adequate to support the judgment".

#### ASSIGNMENT NO. 2

"2. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquints Bridge and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This issue, as is also the case with all those which follow, is independent of and in addition to the issue of the impairment of contract obligations. Appellees statement (Typewritten Statement, p. 6) that appellant's claim of confiscation is based upon failure to receive a return of 15% upon the rate base established by Sections 2845 and 2846 of the Political Code of the State of California is entirely erroneous. Appellant's claims, upon the issue of confiscation, are based upon the principles usually applicable to public utility and common carrier rate cases, just as though there were no contract at all in the case.

The point urged by appellant is that upon the usual ascertainment of operating revenues, operating expenses of all classes, fair value and fair rate of return, the Reilroad Commission's rates will confiscate appellant's property in the Carquinez Bridge.

The further and additional issue of confistation based upon the fact that the property in the Carquinez Bridge is a wasting asset and will be lost to the owner at the end of ten years will be considered under Assignment No. 3.

It will be observed that the above Assignment No. 2 relates to the *Carquinez* Bridge alone. Reference to the additional situation of appellant's *Antioch* Bridge will be contained in subsequent assignments of error.

On the above issue, appellant's said Statement says (Section E, Paragraph 2):

"The Railroad Commission's order confiscates the property of appellant in said Carquinez Bridge \* \* \* because the tolls fixed by the Railroad Commission will fail to yield a fair return on the fair value of the property.

"The reduction which the Railroad Commission made in the tolls of the Carquinez Bridge will have the effect of reducing the gross revenue of the bridge from \$1,552,934.00 in 1937 to only \$1,143,520.00 in 1938, being a reduction of 26.4%. The reduction in the net revenue will be from \$963,816.00 in 1937 to \$570,298.00 in 1938, being a reduction of 40.3%."

And yet appellees claim that this question is not substantial! (Typewritten Statement, pp. 6-7)?

Appellees next say:

"The fact is, as the Court's opinion sully explains, the Railroad Commission fixed rates to yield appellant 7½ per cent return upon the property value taken as a rate base. In the litigation below, appellant denied that the rates fixed would yield a return of 7½ per cent, but conceded that they would yield 6.6 per cent."

In denial of the statements just quoted, appellant is prepared to show, on the merits:

- 1. That the Railroad Commission's decision fails to make any of the following "basic or essential findings required to support the Commission's order" (Florida v. United States, 282 U. S. 194, 215) in a case involving the fixing of rates or tolls:
  - a. There is no finding of the fair value of the property or the fair rate base;
  - b. While the order purports to establish a rate for 1938, there is no finding as to what revenue the rate established by the Commission will produce in 1938 or in any subsequent year;
  - c. There is no finding as to the reasonable amount of maintenance and operating expenses and taxes to be paid in 1938 or in any subsequent year;
  - d. There is no finding as to a reasonable and proper allowance for depreciation or amortization in 1938 or in any subsequent year;

- e. There is no finding as to how many dollars will remain in 1938 or in any subsequent year for return on the fair value of the property;
- f. There is nothing whatever in the decision to show that the rates established by the Commission will yield a return of even 7.5 per cent on the fair value of the property. The entire matter is left to speculation and conjecture and this Court is called upon by the Commission to do the fact-finding work which it was the Commission's duty to do (see West v. Chesapeake & Potomac Telephone Company, 295 U. S. 662, 675).
- 2. That, while the Railroad Commission found that, because of the physical and financial hazards of this particular enterprise, the appellant is entitled to a return of 7½ per cent on some undisclosed fair value, the rates fixed by the Commission, if applied to the Carquinez Bridge alone and not also to the Antioch Bridge, would, in fact, yield a return not in excess of 6.6 per cent on the lowest possible base figure shown in the record and entitled to consideration, which figure is substantially less than fair, value.

As we have hereinbefore pointed out, we are now considering the issue of confiscation upon the principles usually applicable to public utilities and common carriers in rate cases without taking into consideration the further fact that the title to the Carquinez Bridge will be lost to the owner, at the end of ten rears from the present time, without the payment of any compensation to the owner.

Appellant has never conceded and does not now concede that said rates will yield a return of as much as 6.6 per cent on fair value or on any proper rate base figure. It is appellant's position, which it will be prepared to develop on brief and argument, that the rates established by the Commission would rield a return substantially less than 6.6 per cent on the fair value of appellant's property in the Carquing Bridge.

- 3. That even a 6.6 per cent return would be
  - -less than the return of 7.5 per cent which the Commission found that appellant should receive;
  - —less than the actual cost in 1938 of all the money in the project, determined without dispute to be 7.851 per cent;
  - —less than the cost of money in connection with the original bond issue of 1925, admitted by the experts of both the Commission and the appellant to be 9.71 per cent;
  - —less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95 per cent; and
  - —far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money.
- 4. That the facts relating to the construction and operation of the Carquinez Bridge, the pioneer toll bridge across San Francisco Bay, are sui generis and

that no proper conclusion with reference to the issue of confiscation as to this bridge can be reached without a careful consideration of all the relevant facts of this case, all of which will appear in the Transcript of Record.

It is respectfully submitted that appellees' claim that there is no substantial Federal question involved in this issue is entirely without merit.

#### ASSIGNMENT NO. 3

"3. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not fail to recognize and to give effect to the rights of appellant in a wasting asset, namely, the Carquinez Bridge, the title to which will revert to the Counties of Contra Costa and Solano on the expiration in 1948 of the franchise granted by said Ordinance No. 171 for the construction and operation of the Carquinez Bridge, and in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property, without due process of law, and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This assignment of error is based on the unusual situation that the Carquinez Bridge is a "wasting asset", the title to which will be lost to appellant long before the expiration of the physical life of the structure. This result follows from the fact that the term of the franchise is only twenty-five years and that the franchise expressly provides that on its expiration (which will be only ten years from the present time), the title to the bridge will revert to the two adjacent Counties of Contra Costa and Solano without the payment of any compensation to the owner of the bridge.

Unless the investors have had returned to the their investment, with reasonable interest and dividends, before the expiration of the term of the frachise in 1948, they will have lost the same irretrievally.

This assignment of error is quite different from the preceding assignment. That assignment urged confiscation based upon the principles usually applicable in public utility and common carrier rate cases. Under the assignment now urged, confiscation is revealed by failure to earn, in the case of a "wasting asset" which will be lost to the owner at the end of ten years sufficient money to return to the owner, within that time, the remaining portion of the investment plus reasonable interest on the bond money and reasonable dividends on the stock money.

We have not found any decision of this Court hased on a similar state of facts and believe that in this respect the case is one of first impression.

The record shows that during the period from the granting of the franchise in February, 1923 to December 31, 1935, appellant's earnings, either from the Carquinez Bridge or from the Antioch Bridge or from both bridges together, were insufficient to permit the payment of any dividend.

The Railroad Commission, conceding the status of the Carquinez Bridge to be that of a "wasting asset", nevertheless took the position that the Commission is not at all concerned with what may have happened prior to the Act of July 1, 1937 (St. 1937, ch. 896, pp. 2473, 2478) which, for the first time, undertook

to confer upon the Railroad Commission jurisdiction over toll bridges. The Commission took the position that it was concerned only with the future and particularly with the question whether or not the tolls would be sufficient to amortize the remaining portion of the investment during the remaining term of the franchise, without regard to whether or not proper interest and reasonable dividends had been paid.

On this subject, the position of the appellees is stated as follows (Typewritten Statement, p. 7):

"It is suggested in the Assignment of Errors that the Commission failed to recognize and give effect to the rights of appellant 'in a wasting asset.' On the contrary, the Supreme Courf of California correctly states that the Commission, in computing the net annual receipts, made allowances for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period."

The Court will note that while appellees concede the necessity of rates high enough to amortize the remaining portion of the principal of the investment before the expiration of the franchise period, no reference whatever is made to the necessity of permitting appellant to earn sufficient money to pay *interest* on bond money and *dividends* on stock money.

We are prepared to show, in brief and on argument on the merits, that the undisputed testimony shows the following situation with reference to this "wasting asset":

- 1. That at the end of the franchise period in 1948, the revenues from the rates now fixed in the Railroad Commission will have failed to rain the remaining portion of the investment, in the 437,167 shares of stock of the par value of \$100 per share will not have been retired;
- 2. Furthermore, that said revenues will have failed to apply as much as a single dollar on the \$2,404,600.00 of dividends which the Company failed to earn and declare during the period from May 21, 1927 to December 31, 1935, said figure of \$2,404,600.00 including nothing whatever for interest on unpaid dividends; and
  - 3. Finally, that unretired capital stock # \$1.00. per share plus unpaid dividends, will amount, at the end of the franchise period, to the sum of \$2,841.767.00.

We respectfully submit that it is too clear in argument that the "wasting asset" issue thus presented constitutes a substantial Federal question.

### ASSIGNMENT NO. 4

"4. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in both the Carquines and the Antioch Bridges and did not constitute a deprivation of said property without due process of law and did not deay to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This assignment raises the issue of confiscation as to appellant's property in both the Carquinez and the Antioch Toll Bridges, determined in accordance with the usual rate making principles.

As bearing on the substantial character of this Federal question, we shall be prepared to show, on brief and argument:

- 1. That appellant's Antioch Bridge is located across the same water barrier as the Carquinez Bridge, only about twenty-five miles distant;
- 2. That both bridges were constructed by appellant at the same time as parts of a single, unified transportation system and that both bridges have at all times been operated by appellant as parts of one and the same enterprise;
  - 3. That both bridges serve largely the same territory and the same traffic, that they are distinctly competitive with one another and that the inevitable effect of a reduction in the rates of the Carquinez Bridge will be to force a similar reduction in the rates of the Antioch Bridge;
  - 4. That it was the Railroad Commission's duty to consider both bridges together and to fix the tolls to be charged by both and to grant appellant's motion to that effect;
  - 5. That the application to both bridges of the tolls established by the Railroad Commission for the Carquinez Bridge alone would reduce appellant's return to not more than 5.6 per cent on the lowest possible base figure shown in the record and entitled to consideration, which figure is substantially less than "fair value"; and
  - 6. That a return of even 5.6 per cent on both bridges together would be—

- (1) 7.5%—5.6%=1.9% below the rate of return which the Commission found would be reasonable for the Company;
- (2) 9.71%—5.6%=4.11% below the cost of bond money actually used in the construction of the Company's bridges; and
- (3) 8.95%—5.6%=3.35%—below the cost of money resulting from the bond refunding operation of 1935.

We shall be prepared to urge that, bearing in mind the specific facts of this case, including physical and financial hazards attending the construction of the bridges, the Railroad Commission's tolls will, if permitted to become effective, confiscate appellants transportation system, consisting of the Carquine and the Antioch Bridges, and will violate appellants rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States.

We submit that the Federal question presented in the above assignment of error is clearly substantial

#### ASSIGNMENT NO. 5

"5. The Supreme Court of the State of California errel in holding and deciding that the procedure before the Railrosi Commission was not unfair, unjust and arbitrary and did not constitute a denial to appellant of due process of law and did dot Jeny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

We shall be prepared to show that the Railrowl Commission made no finding as to the fair value of the property or the fair rate base, which point has been conceded by counsel for the Commission, and to urge that said failure constitutes denial of due process of law, entirely apart from and in addition to the issues of confiscation.

Furthermore, Assignment No. 5 is a general assignment which will be developed in more detail in connection with the later more specific assignments of error, all dealing with denial of due process of law.

### ASSIGNMENT NO. 6

"6. The Supreme-Court of the State of California erred in failing to hold that, even though the language of Sections 2845 and 2846 of the Political Code of thte State of California be regarded as the language of regulation and not the language of contract, the Legislature of 1937, in declaring toll bridges to be public utilities, did not amend or repeal said Sections of the Political Code or any part thereof and that it was the duty of the Railroad Commission, stepping into the shoes of the Board of Supervisors of said Contra Costa County, to follow, in fixing appellant's said tolls, the rate making standard fixed and prescribed by the Legislature with reference to toll bridges, in said Sections 2845 and 2846 of the Political Code, and said Supreme Court of the State of California further erred in failing to hold that the Railroad Commission's failure to follow the standard of reasonableness of rate making for toll bridges theretofore established by the Legislature constituted a denial to applicant of due process of law and a denial of the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

We believe that this proposition speaks for itself. We are prepared to show:

1. That even if the language of said Sections 2845 and 2846 of the Political Code of California be regarded as the language of regulation and not the language of contract, said sections established a standard of reasonableness applicable to the fixing of tolls to be charged by toll bridge com-

panies in California and that said standard of reasonableness is still the law of California in far as toll bridge companies are concerned;

- 2. That appellant had the legal right to have that standard of reasonableness applied by the Railroad Commission in its investigation into the Carquinez Bridge tolls; and
- 3. That the Railroad Commission's failure and refusal to apply that standard of reasonablenes and its action in substituting another standard not authorized by law constitute a denial to appellant of due process of law in violation of its rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States.

That this question is substantial will, we believe, hardly be doubted by the Court.

## ASSIGNMENT NO. 7

"7. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order, severing the Antioch Bridge from appellant's single, unified transportation system, and fixing tolls for the Carquiner Bridge alone, notwithstanding the fact that the record shows without dispute that the inevitable effect of the reduction of tolls on the Carquinex Bridge would, by the force of competition between the two bridges, compel appellant to make a similar reduction in the tolls charged on the Antioch Bridge, was not unfair, unjust and arbitrary action and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This proposition is based, primarily, on the fact that the Carquinez and the Antioch Bridges are largely competitive, so that reduced tolls on one of these bridges will necessarily and inevitably force reduced tolls, in like amount, on the other bridge. Both bridges are owned and operated by the same company (the appellant herein) and it seems very clear that a rate fixing public authority undertaking to fix tolls to be charged by appellant cannot fairly and properly confine its consideration to the more profitable one of the two bridges and refuse to fix tolls for the less profitable bridge.

We are prepared to show that, on the facts of this case, which will be fully set forth in the Transcript of Record, the Railroad Commission's exclusion of the Antioch Bridge and its establishment of tolls for the Carquinez Bridge alone, without taking into consideration the inevitable necessity for appellant to make a like reduction in the tolls of the Antioch Bridge, with the resulting effect of confiscation of appellant's transportation system, consisting of both the Carquinez and the Antioch Bridges, was so unfair, unjust and arbitrary as to constitute denial of due process of law within the rule established by this Court in many decisions, including the following:

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547; State of Washington, ex rel. Oregon Railroad and Navigation Company v. Fairchild, 224 U. S. 510, 524;

Great Northern Railway Company v. State of Minnesota, 238 U. S. 340, 345;

Northern Pacific Railway Company v. Department of Public Works of the State of Washington, 268 U. S. 39, 45.

That such a question is substantial, we do not doubt.

### ASSIGNMENT NO. 8

"8. The Supreme Court of thte State of California errel in holding and deciding that the procedure before the Raircad Commission, particularly the institution of the case by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges, and the conduct of the inquiry thereafter without the formulation of any issues by the filing of answer or in any other way, and the Railroad Commission's failure to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, did not deny to appellant due process of law and did not deny to it the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

The same point is thus stated in Section E, Pargraph 3, of appellant's Statement:

"The entire procedure before the Railroad Commission constitutes a denial of due process of law for each of the reasons specified in the assignment of errors, including, particularly, the reason that the case was instituted by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges and the inquiry was thereafter conducted without the formulation of any issues by the filing of answer or in any other way and the Railroad Commission failed to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, all in denial of the requirements of due process of law as most recently established by this Court in Morgan v. United States, 304 U. S. 1."

Here, as in the Morgan case, appellant was brought into contest with the Government (the State) in a quasi-judicial proceeding aimed at the control of appellant's activities.

Here, as there, the Government (the State) prosecuted the proceeding. Here, as there, the proceeding had all the elements of contested litigation, with the Government and its counsel on the one side and appellant and its counsel on the other.

We shall be prepared to show, on brief and argument, that

- (1) Here, as in the Morgan case the proceeding was initiated by a mere order or notice of inquiry. Copy of the document is attached to the Petition for the Writ of Review as Exhibit "B". Said document merely provides for an investigation into "the rates, charges, contracts, classifications, rules and regulations" of appellant in the operation of the Carquinez Bridge. Where, among all these matters, the lightning would strike, or what the State's proposals were, appellant at no time prior to the decision, had any means of knowing.
- (2) Here, as in the Morgan case, no complaint was ever filed and under the Commission's procedure in the relatively few cases of investigation on the Commission's own motion, none was required.
- (3) Here, as in the Morgan case, no answer was ever filed and no issues were ever framed by any pleadings.

- (4) Here, as in the Morgan case, the State a no time prior to the decision, ever advised appel lant of what it proposed to do, by means of proposed findings or by any other means.
- (5) Here, as in the Morgan case, the State did not make known what it proposed, by an oral argument or by any brief setting forth such proposals.

The following language from the Morgan case applies exactly to the present situation (p. 19):

"And the appellants had no further information of the Government's (State's) concretely claims until they were served with the Secretary's (Railroad Commission's) order."

At page 7 of their typewritten Statement, appelled state that the proceeding before the Railroad Commission "was initiated in the usual manner" by a order instituting an investigation into the reasonable ness of appellant's rates. However, it will be conceded that almost all the cases before the Railroad Commission of California are handled by formal complaint by third parties and by formal answer thereto. To equestion now before this Court does not relate those cases, in which issues are framed in the usual manner by complaint and answer, but only to the comparatively rare cases in which the proceeding are initiated by the Railroad Commission itself its own motion and only to those of such cases which the Railroad Commission fails to advise the results of the Railroad Commission fails to advise the Railroad Commission fails the Railr

defendant, prior to the actual decision, of what the Commission's proposals are.

We believe that this question is one of the most important issues in the present case. The question is—Is there any reason why the principle of the Morgan case, clearly applicable to the proceedings of Federal administrative tribunals, is not equally applicable to the proceedings of State administrative tribunals?

We shall be prepared to urge that the principle is applicable to all administrative tribunals, whether established by the Federal government or by a State government.

We shall urge that the decision in the Morgan case is squarely applicable to our case and that on the basis of that decision alone, the judgment of the Supreme Court of California should, after brief and argument, be reversed.

It is inconceivable to us that anyone should seriously urge that this Federal question is not substantial.

# 3. SUBSTANTIAL FEDERAL QUESTIONS— APPLICABLE PRINCIPLES

We understand that cases dismissed by this Court for want of a substantial Federal question are largely those in which the Federal question or questions are found to be "frivolous" or in which the Federal question or questions are deemed to be foreclosed by well settled principles enunciated in prior decisions of this Court.

Obviously, the present case falls within neither category.

Rather, we submit, are the Federal questions in the present case questions which "require analysis at exposition for their decision" within the rule lad down by this Court in Milheim v. Moffat Tunnel laprovement District, 262 U. S. 710. At page 716, the Court said:

"The federal question presented, being on which requires analysis and exposition for its decision, is not frivolous; and the motion to dismiss the writ of error is accordingly denied."

Likewise, we have in mind what this Court said in Louisville & Nashville Railroad Company v. Melton. 218 U. S. 36. In denying a motion to dismiss, based upon the claim that the Federal question relied upon had been so conclusively foreclosed by prior decisions of the court as to be frivolous and, therefore, not adequate to confer jurisdiction, this Court said (p. 49):

"The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisived this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations, a, because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented \* \* \* "

Also, we do not believe that the various Federal questions herein at issue could be satisfactorily decided without brief and argument on the merits.

Finally, on the question whether or not the Federal questions herein at issue are substantial, we respectfully refer the Court to its recent decision in Hamilton v. Regents of the University of California, 293 U.S. 245. At page 258, this Court said:

"And the appellees insist that this appeal should be dismissed for the want of a substantial federal question. But that contention can not be sustained; for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." (Citing authorities).

We respectfully submit that in the present case it cannot possibly be said that *each* of the various Federal questions "is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance".

In fact, we hope to be able to show, on brief and argument, that all of the Federal questions on which we rely are substantial and meritorious.

As the only point urged in support of the motion to dismiss or affirm is that none of the Federal queswithout merit, we respectfully submit that appelled motion should be denied and that the appeal be and on the merits, on brief and argument.

Dated at San Francisco, California, this 30th day of November, 1938.

MAX THELEN,

Attorney for American Toll Bridge Company, Appellant. In

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In the Supreme Court of the CAOPLEY

# United States

OCTOBER TERM, 1938.

No. 704

AMERICAN TOLL BRIDGE COMPANY, a Corporation,

Appellant,

VS

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVILIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California,

Appellees.

## BRIEF OF APPELLANT.

MAX THELEN,

San Francisco, California.

Counsel for Appellant.



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1. Where the question at issue is the alleged impairment of the obligations of a contract, this Court, while giving due consideration and weight to the views of the State's highest court, will make an independent examination and will decide for itself (a) whether a contract was made, (b) what are its terms and conditions and (c) whether the State has, by subsequent legislation, impaired the obligations of the contract	
2. The contract in the present case is evidenced by Ordinance No. 171 of the Board of Supervisors of Contra Costa County, California, which ordinance granted the right to construct and operate the Carquinez Toll Bridge and the construct the construct of the construction of the construct	• • •

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3.	The terms and conditions of the contract appear in said Ordinance No. 171 and in certain provisions of the Political Code of California which were read into and became a part of the contract
4.	That the Carquinez Bridge franchise ordinance and its acceptance constitute a contract binding, in California, on both parties, appears from the decisions of this Court and of the Supreme Court of California.
5.	The Legislature of California expressly ratified Ordinance No. 171
6.	The Supreme Court of California heretofore decided that this very Ordinance No. 171 and its acceptance constituted a binding contract
7.	By virtue of the terms and conditions of said contract, appellant has a contract right that its bridge tolls shall not be reduced by the public authorities unless it shall first appear that said tolls are yielding a return in excess of 15 per cent on the rate base specified by Sections 2845 and 2846 of the Political Code of California
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10.	
11.	The order of the Railroad Commission of California impaired the obligations of appellant's said contract, in

II

violation of appellant's rights under Section 10 of Article I of the Constitution of the United States
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2. The facts in the present case fall squarely within the decision in the Morgan case.
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3. Railroad Commission failed to make any of the basis or essential findings
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b. No finding as to gross revenue, operating an maintenance expenses; taxes, depreciation, depletion or any other basic and essential rate-makin factor
C. The procedure of the Railroad Commission constitute a denial of due process of law because the Commission failed to follow the rate-making rule or standard pro- scribed by the Legislature of California for application to toll-bridge companies.
1. Sections 2845 and 2846, Political Code, have never been repealed. If their language is the language of regulation as distinguished from the language contract, said sections contain the rate-making rule or standard which is at this time applicable to to bridge companies

	language of regulation, it was the duty of the Railroad Commission to apply the presently effective rate-making rule of said sections to the tolls of the Carquinez Bridge
	3. Failure of the Railroad Commission to apply the rate-making rule of Sections 2845 and 2846 of the Political Code to the tolls of the Carquinez Bridge constituted a denial of procedural due process of law
	a. Where the Legislature has prescribed a rule or standard of rate-making, it is the duty of the rate-making authority to follow such rule or standard
	b. Failure of the rate-making authority to follow the legislative rule or standard of rate-making is arbitrary action which constitutes denied of pro- cedural due process of law
D.	Exclusion of Antioch Bridge. The procedure of the Railroad Commission constituted a denial of due process of law because the Commission unfairly, unjustly and arbitrarily severed the Antioch Bridge from appellant's single, unified transportation system and fixed tolls for the Carquinez Bridge alone, notwithstanding the fact that the record shows, without dispute, that the inevitable effect of the reduction of tulls on the Carquinez Bridge would, by force of competition between the two bridges, compel appellant to make similar reductions in the tolls charged on the Antioch Bridge, a losing venture, thus accomplishing by indirection a result which the Railroad Commission could not accomplish directly
	1. Company's motion and Commission's decision.

The Carquinez and the Antioch Bridges are component parts of the single, unified transportation system of American Toll Bridge Company
 The Carquinez and the Antioch Bridges are competitive with one another and charge the same rates.

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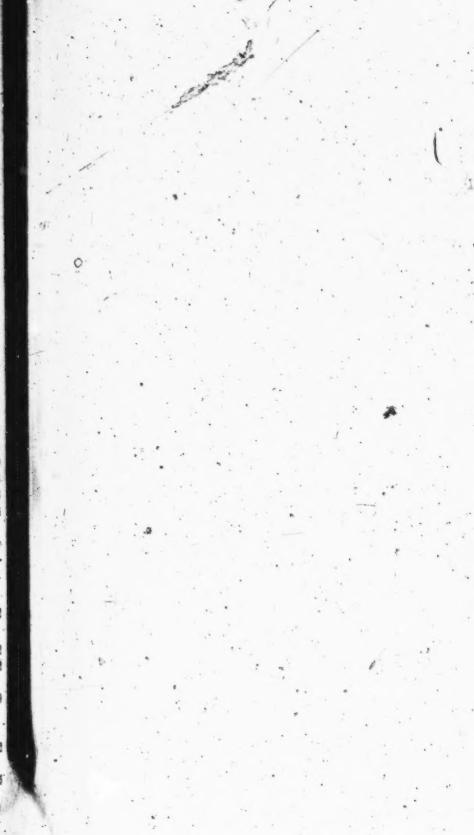
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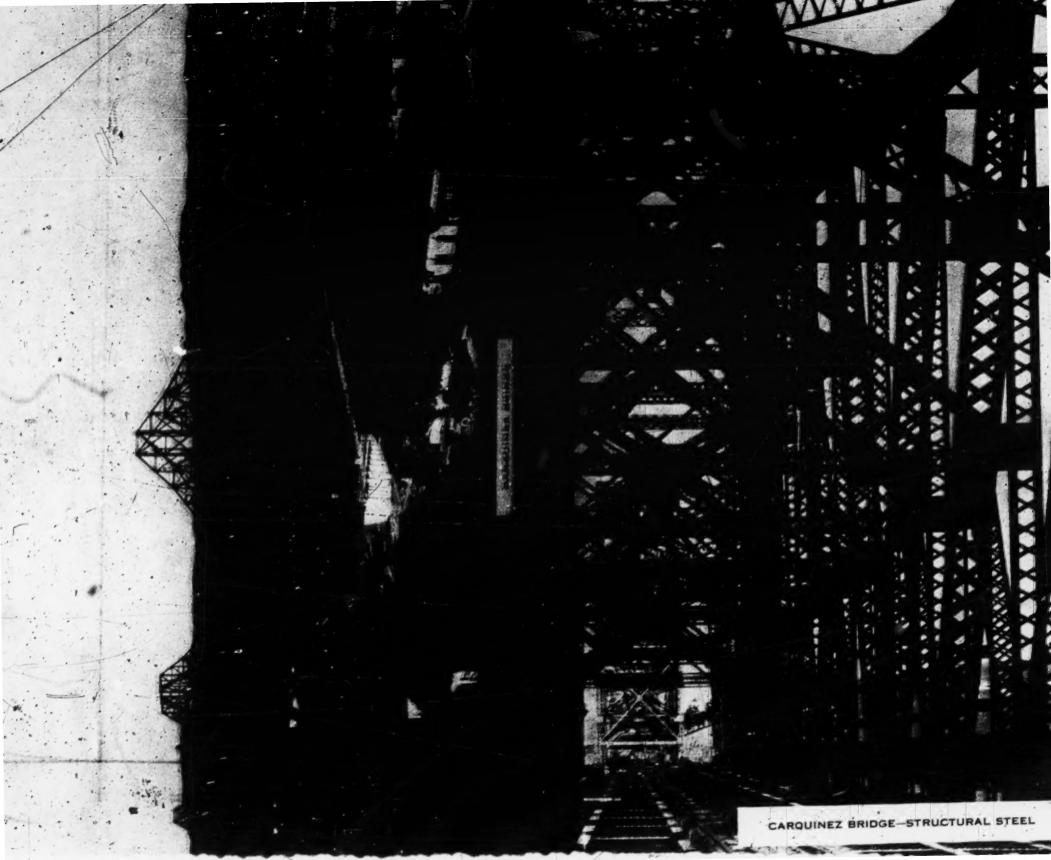
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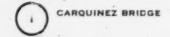
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PRINCIPAL AREA SERVED BY CARQUINEZ AND ANTIOCH BRIDGES





## In the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 704

AMERICAN TOLL BRIDGE COMPANY, a Corporation,

Appellant,

VS

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California,

Appellees.

#### BRIEF OF APPELLANT.

#### OPINION IN COURT BELOW.

The opinion of the Supreme Court of California is officially reported, in pamphlet form, in 96 Cal. Dec. 367.

#### GROUNDS ON WHICH JURISDICTION OF COURT IS INVOID

This is an appeal by American Toll Bridge Company (hereinafter called appellant) under Section 237(a) of the Judicial Code, U. S. C. A., Title 28, Section 34 (as amended by the Act of February 13, 1925, ch. 22) Section 1, 43 Stat. 936) and under the Act of January 31, 1928, ch. 14, 45 Stat. 54, and the Act of April % 1928, ch. 440, 45 Stat. 466, from a final judgment in a suit in the highest court of the State, to-wit, the Supreme Court of the State of California, in which suit there was drawn in question the validity of a certain order, legislative in character, of the Railroad Commission of the State of California, on the grand that said order was repugnant to the Constitution of the United States, particularly the provision of Sec tion 10 of Article I thereof providing, in part, that no State shall pass any law impairing the obligation of contracts and the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing, in part, that no State sha deprive any person of property without due process law nor deny to any person within its jurisdiction the equal protection of the laws.

The order of the Railroad Commission of California was an order made and entered on February 8, 193 Decision No. 30,612 (R. 31) reducing the tolls charge and collected by appellant from passengers and aut mobiles using appellant's Carquinez Bridge, a to bridge constructed and operated by appellant acrothe Straits of Carquinez between the Counties Contra Costa and Solano, State of California.

In so acting, said Railroad Commission exercised delegated legislative authority. Said order of the Railroad Commission was final and was legislative in character.

The judgment of the Supreme Court of California sought to be reviewed herein was made and entered on the 27th day of September, 1938 (R. 122).

The Petition for Appeal was presented by appellant and filed and the Order Allowing Appeal herein was made and entered on the 28th day of October, 1938 (R. 197, 202).

A concise statement of the grounds on which the jurisdiction of this Court is invoked is as follows:

- 1. The Supreme Court of California erred in holding and deciding that the Railroad Commission's said ordered did not impair the obligation of the contract between appellant and the State of California, evidenced by Ordinance No. 171 (Appendix No. 1 to this Brief) of the Board of Supervisors of Contra Costa County, California, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.
- 2. The Supreme Court of California erred in holding and deciding that the procedure of the Railroad Commission did not constitute a denial of procedural due process of law for each of the reasons specified in the Assignment of Errors on file herein and here-

inafter more specifically set forth, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. The Supreme Court of California erred in bolding and deciding that the Railroad Commission's said order did not confiscate the property of appellant in each respect specified in said Assignment of Error and hereinafter more specifically set forth, within the meaning of Section 1 of Article XIV of the Americants to the Constitution of the United States.

Said grounds appear in greater detail in said Assignment of Errors (R. 199-201), in appellant's Statement as to Jurisdiction, in Brief of Appellant in Opposition to Motion to Dismiss or Affirm hereifore filed herein, and in the subsequent portions of this Brief.

On March 13, 1939, this Court entered an order noting probable jurisdiction and denying the motion to dismiss or affirm.

#### STATEMENT OF CASE.

#### 1. AMERICAN TOLL BRIDGE COMPANY'S TWO TOLL BRIDGE

American Toll Bridge Company owns and operate two toll bridges across the same water barrier, namely the Carquinez Straits and the San Joaquin River in the State of California, as follows:

a. The Carquinez Bridge, between Crockett, n Contra Costa County, and an opposite point n Solano County; and b. The Antioch Bridge, across the San Joaquin River near Antioch, between the Counties of Contra Costa and Sacramento, at a point about twenty-five miles east of the Carquinez Bridge.

For photographs of the Carquinez Bridge, see frontispiece.

These bridges are located only twenty-five miles apart and serve, in major part, the same territories and the same traffic at the same rates under competitive conditions. For map showing the location of said bridges, see frontispiece.

#### 2. THE TOLL BRIDGE FRANCHIBES.

The franchises for the construction and operation of said two bridges were granted by the Board of Supervisors of Contra Costa County in accordance with the provisions of Sections 2843 to 2858 and 2870 to 2881 of the Political Code of the State of California.

The franchise for the Carquinez Bridge was granted on February 5, 1923 and will expire on or about March 5, 1948 (Appendix No. 1 to this Brief).

The franchise for the Antioch Bridge was granted on June 4, 1923 and will expire on or about July 4, 1948 (Exh. 1, R. 209, 226).

Each franchise provides that upon its expiration the title to the toll bridge shall revert to the adjacent counties without the payment of any compensation to the Company (Appendix No. 1 to this Brief; Exh. 1, R. 209, 227).

Hence, only 9 years remain before American To Bridge Company will lose its property in both bridge

#### 3. OPENING OF BRIDGES TO TRAFFIC.

The Antioch Bridge was opened to traffic on Juneary 1, 1926 (Exh. 1, R. 209, 210).

The Carquinez Bridge was opened to traffic on Ma 21, 1927 (Exh. 1, R. 209, 210).

#### 4. 1987 LEGISLATION.

In 1937, the Legislature of California, for the fittime, enacted legislation declaring toll bridge contrations to be public utilities and providing for the regulation by the Railroad Commission (St. 1937, 896, pp. 2473, 2478). This statute became effective August 27, 1937.

Prior to August 27, 1937, the Railroad Commiss had no authority of any kind over toll bridge operations.

Ever since the enactment of the Political Code 1872, the tolls charged by such corporations winserted by the Boards of Supervisors of the appriate counties into the ordinances granting the frechises and were subject to change only as specified Sections 2845 and 2846 of the Political Code. Sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the sections are hereinafter in this Brief set forth in the section of the

Copy of said Act of July 1, 1937, in so far as it lates to toll bridge corporations, is attached to Brief as Appendix No. 2.

#### 5. PROCEEDINGS BEFORE RAILROAD COMMISSION.

#### Institution of investigations.

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On August 27, 1937, the Railroad Commission, on its own motion, in Case No. 4244 instituted an investigation into the operations, service, rates, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, privileges and facilities, or any thereof, of American Toll Bridge Company, San Francisco Bay Toll Bridge Company and Dumbarton Bridge Co., owning and operating toll bridges across the waters of San Francisco Bay and tributaries. The Order specifically designated both the Carquinez and the Antioch Bridges of American Toll Bridge Company (R. 27).

Thereafter, on October 4, 1937, after the Commission's experts had been examining appellant's books for approximately a month, the Commission, in Case No. 4259, instituted another investigation into the rates, charges, contracts, classifications, rules and regulations, or any thereof, of American Toll Bridge Company. This investigation, however, was expressly limited to the Carquinez Bridge, and did not include the Antioch Bridge or either of the bridges of San Francisco Bay Toll Bridge Company or Dumbarton Bridge Co. (R. 30).

The initial hearing in both Cases was thereafter held on October 26, 1937. At that time, the Presiding Commissioner announced that the Commission intended to defer action in Case No. 4244 and to confine its inquiry to Case No. 4259, directed exclusively to the Carquinez Bridge (R. 203).

No complaint or answer were ever filed in said Car No. 4259 and at no time and in no way, prior to in decision, did the Railroad Commission ever advis appellant of the State's proposals.

#### b. Hearings and decision.

Hearings in said Case No. 4259 were held by the Railroad Commission on various dates between 0ctober 26, 1937 and January 28, 1938.

On February 8, 1938, the Railroad Commission made and filed its Decision No. 30,612 in said (R. 31).

In said decision, the Railroad Commission reduced the tolls of the Carquinez Bridge alone (not including the Antioch Bridge) from 60¢ per automobile plus 10¢ per passenger to 45¢ per automobile plus 5¢ per passenger (R. 39). The evidence shows an average of 2.2 passengers per automobile (R. 280). According the Commission's reduction is from an average of 80 per automobile and passengers to 56¢, being a reduction

The reduction, if operative, will have the effect of reducing the gross revenue of the Carquinez Bridger from \$1,552,934.00 in 1937 to only \$1,143,520.00 in 1938, being a reduction of 26.4%. The reduction in the income will be from \$963,816.00 in 1937 to \$570,298.00 in 1938, being a reduction of 40.8% (Exh. 180).

tion of 26¢ per average automobile and passengers.

#### c. Petition for rehearing.

On February 17, 1938, American Toll Brid Company filed with the Railroad Commission its Pe

Table 4, col. 1937, R. 491, 493; this Brief, page 140

tion for Rehearing, as provided in Section 67 of the Public Utilities Act, St. 1915, ch. 91, p. 115, 161 (R. 40).

On February 21, 1938, the Railroad Commission made and filed its order denying said Petition for Rehearing, without referring to any point raised in said Petition (R. 79).

#### 6 PROCEEDINGS BEFORE THE SUPREME COURT OF CALIFORNIA.

On April 6, 1938, on petition of appellant, Writ of Review issued out of the Supreme Court of California (R. 115).

After the filing of briefs and oral argument, said Court, on September 27, 1938, rendered a "By the Court" decision (96 Cal. Dec. 367; R. 122).

On October 17, 1938, appellant filed its Petition for Rehearing, as provided by the Rules of said Court (R. 141).

On October 27, 1938, said Court made and filed its order denying said Petition, without opinion (R. 196).

### 7. PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES.

On October 28, 1938, Order Allowing Appeal and granting supersedeas was signed by the Chief Justice of the Supreme Court of California and filed (R: 202).

Thereafter, on November 12, 1938, appellees filed in the office of the Clerk of the Supreme Court of California their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, which Statement has been separately printed. Appellant thereafter filed in this Court its Brief in Opposition to said Statement and Motion.

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On March 13, 1939, this Court made and entered it order noting probable jurisdiction and denying said Motion to Dismiss or Affirm.

The record herein consists of printed Transcript of Record plus a number of "Original Exhibits" which on order of the Chief Justice of the Supreme Court of California, have been certified separately and for warded to the clerk of this Court (R. 20).

Said "Original Exhibits" consist of a large number of photographs showing the progress of the construction work on the Carquinez Bridge from the beginning to the end and also all of appellant's important engineering and financial exhibits. Portions of su exhibits have also been incorporated in the printer Transcript of Record.

Unless otherwise specified, italics herein are ours.

#### ASSIGNED ERRORS.

Appellant intends to urge each of the assign errors heretofore filed in the office of the Clerk of Supreme Court of California and printed in the Trascript of Record herein (R. 199-201).

Said assigned errors are as follows:

1. The Supreme Court of the State of Californiered in holding and deciding that the Railroad Comission's order establishing the tolls to be charged a

collected by appellant for pedestrians and automobiles using appellant's Carquinez Bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, did not impair the obligation of the contract evidenced by Ordinance No. 171 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provision of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.

- 2. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.
- 3. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not fail to recognize and to give effect to the rights of appellant in a wasting asset, namely, the Carquinez Bridge, the title to which will revert to the Counties of Contra Costa and Solano on the expiration in 1948 of the franchise granted by said Ordinance No. 171 for the construction and operation of the Carquinez Bridge, and in holding and deciding that the Railroad Commission's order did not

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confiscate appellant's property in said Carquina Bridge and did not constitute a deprivation of said property, without due process of law, and did not deay to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

- 4. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's properly in both the Carquinez and the Antioch Bridges and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.
- 5. The Supreme Court of the State of California erred in holding and deciding that the procedure before the Railroad Commission was not unfair, unjust and arbitrary and did not constitute a denial to appellant of due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.
- 6. The Supreme Court of the State of California erred in failing to hold that, even though the language of Sections 2845 and 2846 of the Political Code of the State of California be regarded as the language of regulation and not the language of contract, the Legislature of 1937, in declaring toll bridges to be public utilities, did not amend or repeal said Sections of the Political Code or any part thereof and that it was the

duty of the Railroad Commission, stepping into the shoes of the Board of Supervisors of said Contra Costa County, to follow, in fixing appellant's said tolls, the rate making standard fixed and prescribed by the Legislature with reference to toll bridges, in said Sections 2845 and 2846 of the Political Code, and said Supreme Court of the State of California furfier erred in failing to hold that the Railroad Commission's failure to follow the standard of reasonableness of rate making for toll bridges theretofore established by the Legislature constituted a denial to appellant of due process of law and a denial of the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

7. The Supreme Court of the State of California erred in holding and deciding that the Railroad. Commission's order, severing the Antioch Bridge from appellant's single, unified transportation system, and fixing folls for the Carquinez Bridge alone, notwithstanding the fact that the record shows without dispute that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by the force of competition between the two bridges, compel appellant to make a similar reduction in the tolls charged on the Antioch Bridge, was not unfair, unjust and arbitrary action and did not deny to appellant due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States

The Supreme Court of the State of California erred in holding and deciding that the procedure be fore the Railroad Commission, particularly the institution of the case by the Railroad Commission on it own motion by a mere order or notice of inquiry with out the filing of a complaint or the making of an charges, and the conduct of the inquiry thereafter without the formulation of any issues by the filing of answer or in any other way, and the Railroad Commis sion's failure to advise appellant at any time or in an way, prior to the decision, of the Government's proposals, did not deny to appellant due process of la and did not deny to it the equal protection of the law within the meaning of Section 1 of Article XIV the Amendments to the Constitution of the Unite States.

#### SUMMARY OF ARGUMENT.

A very brief and concise summary of the argument herein is as follows:

- obligation of the contract between appellant and the State of California, evidenced by (a) Ordinant No. 171 of the Board of Supervisors of Contra Cost County, California, including the provisions of existing statutes which were read into and became a part of said contract, and (b) the acceptance of the provisions of said Ordinance by appellant's assignor.
- II. The procedure of the Railroad Commission constituted a denial of procedural due process of la for each of the following reasons:

A. Said procedure constituted a denial of due process of law under the principles most recently stated by this Court in Morgan v. United States, 304 U.S. 1;

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- B. Said procedure constituted a denial of due process of law because the Railroad Commission failed to make findings as to fair value or a proper rate base and to make any of the other necessary basic and essential findings;
- C. Said procedure constituted a denial of due process of law because the Railroad Commission failed to follow the rate-making rule or standard prescribed by the Legislature of California for application to toll-bridge companies; and
- D. Said procedure constituted a denial of due process of law because the Railroad Commission unfairly, unjustly and arbitrarily severed the Antioch Bridge from appellant's single, unified transportation system and fixed tolls for the Carquinez Bridge alone, notwithstanding the fact that the record shows, without dispute, that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by force of competition between the two bridges, compel appellant to make similar reductions in the tolls charged by the Antioch Bridge, a losing venture, thus accomplishing by indirection a result which the Railroad Commission could not accomplish directly.

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III. Entirely independent of and in addition to the point as to the impairment of contract obligations, the Railroad Commission's order, tested by the principles usually applicable to public utility and common carrier rate cases, confiscated the property of American Toll Bridge Company in each of the following respects:

- A. The Railroad Commission's order confiscated appellant's property in the Carquinez Bridge because it failed to accord a fair return on fair value;
- B. The Railroad Commission's order confcated appellant's property in both the Carquinez and the Antioch Bridges because it failed to accord a fair return on fair value; and
- C. The Railroad Commission's order confiscated appellant's property in both bridges for the further reason that it failed to recognize and give effect to the rights of appellant in its wasting assets, namely, the Carquinez and Anticol Bridges, the title to both of which bridges will pass to the adjacent counties on the expiration in 1948 of the franchises granted by said counties for the construction and operation of said two bridges.

#### Argument.

We shall now develop, in appropriate detail, our argument with reference to each of said points.

#### I.

#### IMPAIRMENT OF CONTRACT OBLIGATIONS.

The order of the Railroad Commission of California establishing the tolls to be charged and collected by appellant for pedestrians and automobiles using appellant's Carquinez toll bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, impaired the obligation of the contract evidenced by Ordinance No. 171 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.

1. Where the question at issue is the alleged impairment of the obligations of a contract, this Court, while giving due consideration and weight to the views of the State's highest court, will make an independent examination and will decide for itself (a) whether a contract was made, (b) what are its terms and conditions and (c) whether the State has, by subsequent legislation, impaired the obligations of the contract.

Some of this Court's most recent decisions to this effect are as follows:

New York Rapid Transit Corporation v. City of New York, 303 U. S. 573, 593; Indiana v. Brand, 303 U. S. 95, 100;

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United States Mortgage Co. v. Matthews, 23 U. S. 232, 236;

Coombes v. Getz, 285 U. S. 434, 441;

Larson v. South Dakota, 278 U.S. 429, 433;

Appleby v. City of New York, 271 U. S. 364, 379-80;

Detroit United Railway v. Michigan, 242 U.S. 238, 249, 251.

The Court will not hesitate, where it appears to be necessary to reach a conclusion differing from that of the State Court, to reverse the decision of the State Court as to whether a contract exists, as to what are its terms and conditions, or as to whether the obligations of the contract are impaired by subsequent State legislation. Such reversals are found in the following cases, among others:

Indiana v. Brand, 303 U. S. 95;

United States Mortgage Co. v. Matthews, 288 U. S. 232:

Coombes v. Getz, 285 U. S. 434;

Appleby v. City of New York, 271 U. S. 364;

Georgia Railway & Power Company v. Town of Decatur, 262 U.S. 432;

Detroit United Railway v. Michigan, 242 U.S. 238;

Terre Haute and Indianapolis Railroad Company v. Indiana, 194 U. S. 579;

Houston and Texas Central Railroad Company v. Texas, 177 U.S. 66; Mobile and Ohio Railroad Company v. Tennessee, 153 U. S. 486;

Jefferson Branch Bank v. Skelly, 1 Black (66 U.S.) 436.

The independent examination to be made by this Court is just as applicable where part or all of the contract consists of a State statute which was construed by the State court as is the case where no statute is involved.

Indiana v. Brand, 303 U.S. 95, 100;

Coombes v. Getz, 285 U.S. 434, 441;

Freeport Water Company v. Freeport City, 180 U. S. 587, 595, 610;

Walsh v. Columbus, Hocking Valley and Athens Railroad Company, 176 U.S. 469, 475;

Jefferson Branch Bank v. Skelly, 1 Black (66 U.S.) 436, 443.

2. The contract in the present case is evidenced by Ordinance No. 171 of the Board of Supervisors of Centra Costa County, California, which Ordinance granted the right to construct and operate the Carquines Toll Bridge, and the acceptance thereof by the grantee.

Copy of said Ordinance No. 171 is printed as Appendix No. 1 attached to this Brief. See also R. 269-277.

Said Ordinance was adopted and accepted under and in accordance with the provisions of Article I (entitled "General Provisions") and Article II (entitled "Toll Bridges") of Chapter IV (entitled "Public Ferries and Toll-bridges") of Title VI (entitled "Public Ways") of Part III (entitled "Of the Government of the State") of the Political Code of the State of California.

The Political Code was approved on March 12, 1872.

Ordinance No. 171 was adopted by the Board of Supervisors of Contra Costa County, California, on February 5, 1923, and became effective thirty days from and after its passage (Appendix No. 1 to this Brief).

The Ordinance granted to appellant's assignor the right to construct the Carquinez Bridge and to operate it "for the term of twenty-five (25) years from and after the effective date of the ordinance".

Continuing, the Ordinance provided:

"It is hereby ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the Counties of Contra Costa and Solano."

The proffered franchise was duly accepted by the grantee.

Additional terms and conditions of the Ordinance will be referred to under the next subhead of this Brief.

3. The terms and conditions of the contract appear in said Ordinance No. 171 and in certain provisions of the Political Code of California which were read into and became a part of the contract.

That the provisions of the law under which the franchise was granted entered into and became a part of the contract follows necessarily from the authorities and will, we believe, be conceded.

Kennedy v. City of Gustine, 210 Cal. 18, 21; Flagg v. Sloane, 135 Cal. App. 334, 336;

Frank v. Crescent Wharf & Warehouse Company, 50 Cal. App. 272, 275;

City of Cincinnati v. Public Utilities Commission of Ohio, 98 Ohio St. 320, 3 A. L. R. 705, 708;

6 Cal. Jur. 310, sec. 186.

We also assume that it will be conceded that "a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Article I, Section 10" of the Constitution of the United States.

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 100.

As this Court, speaking through Mr. Justice Cardozo, also said in Worthen Co. v. Kavanaugh, 295 U.S. 56, 60:

"To know the obligation of a contract we look to the laws in force at its making."

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Among the provisions of law which became a part of the contract in the present case were Sections 2845 and 2846 of the Political Code of California.

The relevant portions of said Section 2845, as the same read at the time when said Colinance No. 171 was adopted, were as follows:

- "The board of supervisors granting authority to construct a toll-bridge or to keep a public ferry, must at the same time:
- "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.
- "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year; " ""

Section 2846 has at all times, from and after its enactment in 1872, read as follows:

"The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the

bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

Said sections will hereinafter in this Brief by analyzed in detail. For the present, it will suffice to say that said Ordinance No. 171 complied with said provisions of the Political Code.

After setting forth the prerequisité findings, said Ordinance No. 171 grants to Rodeo-Vallejo Ferry Company, appellant's assignor, the right and franchise to erect, construct and maintain the Carquinez Toll Bridge for the term of twenty-five (25) years from and after the effective date of the Ordinance.

After providing that, at the expiration of said term of twenty-five (25) years, the title to the Toll Bridge shall pass to the Counties of Contra Costa and Solano, the Ordinance specified the type of construction, the location of the terminals in both Contra Costa and Solano Counties and the location of the bridge axis or center line.

The Ordinance provided that the grantee should pay a license tax of \$100.00 per month and provided, also, that the grantee should pay the additional sum of two per cent of the gross revenue for the benefit of the Counties of Contra Costa and Solano. This latter provision was the subject of the action in County of Contra Costa v. American Toll Bridge Company, 10 Cal. (2d) 359, to which case further reference will hereinafter be made.

The Ordinance specified the time for the beginning of the construction of the bridge and also for its completion.

As required by said Section 2845 of the Political Code, the Ordinance next set forth, in considerable detail, the rates of toll to be charged for the different types of user of the bridge.

The Ordinance also provided that the bridge should be constructed in accordance with the requirements of the United States War Department.

In connection with the rate of tolls, the Ordinane provided that the same should be fixed by the Raji road Commission but that in the event that the Railroad Commission failed to do so, the tolls to be collected should be those set forth in detail in the Ordinance. The Railroad Commission did not fix the tolls. The provision for such action by the Railroad Commission was obviously void for the reason that the Board of Supervisors and the grantee of the franchise could not, by any agreement between themselves, confer upon the Railroad Commission a jurisdiction which it did not have. The Legislature had (a) conferred that jurisdiction upon the Board of Supervisors and (b) failed to confer it upon the Railroad Commission. For both of these reasons, said franchise provision was void.

The Railroad Commission concedes (R. 32) that it had no jurisdiction or authority over American Tell Bridge Company or over the Carquinez Bridge prior to the effective date of the Act of July 1, 1937.

The franchise for the construction and operation of appellant's Antioch Bridge was granted by Ordinance No. 175 of the Board of Supervisors of Contra Costa County on June 4, 1923 (Exh. 1, R. 209, 226). In all material respects, including the provisions for a term of only twenty-five years and for the passage of the title of the bridge to the adjacent counties at the end of said time, the provisions of Ordinance No. 175 are substantially similar to those of Ordinance No. 171 (Exh. 1, R. 209, 226-7).

4. That the Carquinez Bridge franchise ordinance and its acceptance constitute a contract binding, in California, on both parties, appears from the decisions of this Court and of the Supreme Court of California.

It is well settled in California that a franchise authorizing a common carrier or other public utility to construct its plant, lines, structures or works creates, when accepted and acted upon, a vested right by contract which cannot be impaired by subsequent legislation.

In Postal Telegraph-Cable Company v. Railroad Commission of California, 200 Cal. 463, the Supreme Court of California, among other matters, gave consideration to the effect of the construction by telegraph or telephone corporations of their lines under permission granted by Section 536 of the Civil Code of California, Referring to said section, the court, in a decision by Chief Justice Waste, said (p. 472):

"This section constitutes a grant of a franchise which the state offered, and petitioner accepted

by the construction of its lines. The rights acquired by the Telegraph Company, by accepting and availing itself of the provisions of the section, are vested rights which the constitutions both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision. (Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 119 et seq.; Postal Telegraph-Cable Co. v. Los Angeles, 160 Cal. 129, 131; In re Keppelmann, 166 Cal. 770, 773.)"

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#### Again, at page 473:

"The grant, resulting from the acceptance of the state offer (in said section 536, C. C.) constituted a contract between the Telegraph Company and the state, secured by the constitution of the United States against impairment by any state legislation (Western Union Tel. Co. v. Hopkins, supra, p. 120; Sunset Tel. & Tel. Co. v. Pomona, 172 Fed. 829, 837; Russell v. Sebastian, 233 U.S. 195, 204-208; State ex rel. Shaver v. Iowa Telephone Co., 175 Iowa 607, 616, Ann. Cas. 19175 539, 154 N. W. 678)."

In Western Union Telegraph Company v. Hopkins, 160 Cal. 106, the Supreme Court of California, in a decision by Mr. Justice Angellotti, said (p. 119):

"Assuming that section 536 of the Civil Code was a grant of the right to such use of the streets we are of the opinion that it must be held, to use the language of the United States circuit court of appeals in Sunset Tel. & Tel. Cov. Pomono.

172 Fed. 837, that the maintenance and operation of such system 'was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the constitution of the United States against impairment by any subsequent state legislation.'"

In Rusrell v. Sebastian, 233 U. S. 195, this Court cided a case involving the rights conferred upon a suppliers of artificial light and other specified thic utility services in California cities by Secon 19 of Article XI of the Constitution of Califmia. On this subject, the Court said (p. 204):

"That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 660; New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 680, 681; Walla Walla v. Walla Walla Co., 172 U. S. 1, 9; Louisville v. Cumberland Telephone Co., 224 U. S. 649, 663, 664; Grand Trunk Rwy. Co. v. South Bend, 227 U. S. 544, 552; Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 65; Boise Water Co. v. Boise City, 230 U. S. 84, 90, 91; Dillon on Municipal Corporations, 5th ed., sec. 1242."

We believe that the citation of further cases to the me effect is unnecessary.

5. The Legislature of California expressly ratified Ordinance No. 171

By Act of May 8, 1923 (St. 1923, ch. 131, p. 272), enacted about two months subsequent to the effective date of Ordinance No. 171, the Legislature of California amended Section 2872 of the Political Code, on the subject of toll bridges, by adding thereto the following sentence:

"All licenses and franchises granted subsequent to the fourteenth day of March, A. D. one thousand eight hundred and eighty-one for the construction of any such bridges across the Saeramento or San Joaquin Rivers, the Suisun Bay; or Carquinez Straits, the Petaluma, Napa or Sonoma Creeks, whether above or below the head of navigation of said waters or streams, are hereby ratified, approved, confirmed and made valid for all purposes; provided, however, that nothing herein contained shall be construed to extend the term of any such license or franchise beyond the period fixed in the order granting the same, or to revive any license or franchise which has lapsed for non-user, or to restore any license or franchise which has been forfeited."

By this Act, the Legislature expressly ratified said Ordinance No. 171.

6. The Supreme Court of California heretofore decided that this very Ordinance No. 171 and its acceptance constituted a binding contract.

In County of Contra Costa v. American Toll Bridge Company, 10 Cal. (2d) 359, decided as recently as December 11, 1937, the Supreme Court of California gave consideration to the very ordinance here at issue. namely, Ordinance No. 171 of the Board of Supervisors of Contra Costa County.

The question there was whether appellant was bound by the provision of said Ordinance No. 171 reading as follows:

"That two (2%) per cent of the gross receipts derived from the use and operation of said bridge shall also and in addition be paid to the County of Contra Costa for the benefit of the counties of Contra Costa and Solano for the use of said franchise."

In deciding that American Toll Bridge Company was bound by said provision, the court held that the language of said Ordinance No. 171 is the language of "agreement" and that the Company was bound by its "contract". At page 361, the court referred to the Company's "definite agreement to meet this charge". At page 363, the court continued the same thought, as follows:

"And when so required this condition becomes a part of the *contract* which the grantee has voluntarily assumed."

At page 364, the court referred to code sections which authorized the board of supervisors to agree with the grantee of the franchise on compensation to be paid by the latter. On this point, the court said:

"In addition to the efficacy of the code sections in authorizing the board of supervisors to impose the condition of additional compensation, or, as in this case, to agree with the grantee that such additional compensation be paid, we take notice of an amendment to section 2872 of the Political Code in 1923, approved May 8th of that year."

Again, at page 366, the court said:

"Having obtained the advantages that have flowed from the grant, the holder may not now with good grace, it at all, effectively resist the performance of an obligation thereunder which it voluntarily and lawfully agreed to undertake."

Justice Edmonds, in his concurring opinion, expressed the same view (p. 367):

"It is a contract between the corporation and the county."

The court thus found that said Ordinance No. 171 constituted a *contract* between this appellant and the County of Contra Costa and that this appellant was bound by the *burdens* of that contract.

We submit, very respectfully, that it would be neither lawful nor just to hold appellant to be bound by the burdens of its contract and yet to deny to appellant the benefits of the same contract.

- 7. By virtue of the terms and conditions of said contract, appellant has a contract right that its bridge tolls shall not be reduced by the public authorities unless it shall first appear that said tolls are yielding a return in excess of 15 per cent on the rate base specified by Sections 2845 and 2846 of the Political Code of California.
- a. The Legislative history of toll bridge construction and operation is California shows the evolution of the contract rights granted to the constructors and operators of toll bridges.

Prior to the enactment of the Political Code in 1872, there were three distinct stages in the legislative

history of toll bridge construction and operation in California.

The first stage commenced with the year 1850 and continued to the year 1857. During this stage, the toll bridge franchises granted by or under authority of the Legislature merely provided that the toll bridge owners should be permitted to charge such tolls as the courts of sessions and, later, the boards of supervisors, should fix annually.

For the general laws enacted on this subject during this period see St. 1850, p. 347; St. 1851, p. 368; St. 1854, p. 123; St. 1855, p. 183.

The second stage in the evolution of the laws dealing with toll bridge construction and operation consisted of a series of Special Acts enacted in 1857 and a number of subsequent years, principally in 1861-4. Without burdening this Brief by reference to each of these Special Acts, we believe that it will suffice to say that there were 22 such statutes. Typical of all the others is the first one, namely, the Act of April 3, 1857, granting the right to construct a toll bridge across the Sacramento River (St. 1857, ch. 150, p. 175).

These Acts all specified that the operators could charge "such rates of toll as the board of supervisors may fix annually; provided, that the Legislature may, at all times, modify or change the rates so fixed".

It will be observed that under both types of Acts thus far noted the matter of rate regulation was in the hands, first, of the courts of sessions and, later, of the boards of supervisors, unrestricted by any ex-

pressed limitation as to the rate of return. The grantees of the toll bridge franchises had no contract pretection against action by the boards of supervises reducing their tolls.

Because of this situation, there occurred the thin stage in the evolution of the legislation dealing with toll bridge construction and operation. General laws and Special Acts of a third type were enacted by the Legislature beginning with the year 1862 and extending up to the adoption of the new Codes in the year 1872. These General Statutes and Special Acts provided, substantially, that the operators of the toll bridges could charge such rates as the boards of supervisors should annually prescribe but there followed a provision of the general tenor that the board of supervisors should not fix the rates of toll so low as to make the net income less than a specified percentage per annum upon the cost or the fair value or some similar specified base figure of the toll bridge property.

At this point, the Legislature clearly entered into the realm of contract and provided that the toll bridge operators thereafter receiving franchises should be protected by contract provisions against reduction of tolls so as to yield less than a specified rate of return Before that time, the grantees of toll bridge franchises were entirely at the mercy of the hoards of supervisors, who had authority to reduce tolls without expressed limitation. Hereafter, the construction of toll bridges was to be encouraged by giving to the toll bridge operators contract protection as specified it said General Statutes and Special Acts beginning with the year 1862.

March 21, 1862 (St. 1862, ch. 74, p. 62) granting a franchise for a toll bridge across the Pajaro River at The Malposo. Section 3 of said Act provides:

The said company, upon the erection and completion of said bridge, shall be authorized and empowered to charge and collect such rates of toll as the Board of Supervisors of Monterey County may fix annually; provided, that the rates of toll shall not be placed at less than sufficient to yield 20 per cent per annum upon the value of such bridge."

On April 15, 1862, the Legislature enacted a general law supplemental to the Act of April 18, 1855 (St. 1862, ch. 229, p. 247), concerning public ferries and toll bridges. This Act authorized boards of supervisors to grant licenses to construct toll bridges across non-navigable streams in their respective counties. Section 1 of the Act authorized the boards to prescribe the rates of toll and to change the same from year to year, as in their discretion might seem proper. Then came the following language:

"but shall not fix them so low as to make the net income less than 15 per cent per annum upon a fair valuation of such bridge."

This was a general law applicable to all toll bridge franchises thereafter to be granted by any board of supervisors, as distinguished from Special Acts of the legislature. The enactment of this general statute works a distinct change of policy on the part of the Legislature. Theretofore the boards of supervisors, grant-

ing toll bridge franchises, had authority to fix the tolls in their discretion; but beginning with 1862 all general statutes on the subject have cortained a provision that the boards of supervisors should have no authority to fix the tolls so as to yield a return less than that definitely specified in the statute.

The Special Act of March 6, 1863 (St. 1863, ch. 4), p. 40) granted a franchise for a toll bridge across the Cosumnes River near Dutch Hill. Section 2 reads as follows:

"And the said parties to whom this franchise is granted, after the completion of the bridge, are authorized to charge and collect such rates of toll as the Board of Supervisors of the County of Amador shall fix; provided, that the rates of toll shall not be placed at less than sufficient to yield 10 per cent per annum upon the value of the bridge, cost of keeping the same in repair, and expenses of collecting toll \* \* \* ."

The Special Act of April 6, 1863 (St. 1863, ch. 151, p. 183) granted a franchise for a toll bridge across the Yuba River. Section 5 reads, in part, as follows:

"Upon the erection and completion of said bridge, said company shall be and are hereby authorized and empowered to charge and collect such rates of toll as the Board of Supervisors for the County of Yuba may annually fix; provided, such rates of toll shall not be fixed so as to yield an annual income of less than 15 per cent on the cost of constructing said bridge \* \* \* "

The Special Act of April 25, 1863 (St. 1863, ch. 32), p. 485) granted a franchise for a toll bridge across

the Mokelumne River near Lancha Plana. Section 2 reads:

"The said parties to whom this franchise is granted, after the completion of said bridge, are hereby authorized to charge and collect such rates of toll as the Board of Supervisors of Calaveras County shall annually fix, provided, that the rates of toll shall not be placed so low as to yield less than 15 per cent per annum upon the value of said bridge, cost of keeping the same in repair, and expenses of collecting toll \* \* \*."

On April 27, 1863, the Legislature enacted another general statute authorizing the boards of supervisors of the various counties to grant licenses to construct toll bridges across non-navigable streams in their respective counties for periods not exceeding twenty years (St. 1863, ch. 444, p. 720). On the subject of the tolls, Section 1 provides as follows:

"and said Board shall have power to prescribe the rates of toll, and change the same from year to year, as in their discretion may seem proper; but previous to the first day of January, Eighteen Hundred and Seventy-three, they shall not fix said rates so low as to make the net income less than twenty per cent per annum upon a fair valuation of such bridge or farry and franchise; and, thereafter, not less than ten per cent per annum upon such valuation, which shall be made at the time in each year when the tolls are fixed."

On the same day, namely, April 27, 1863, the Legislature enacted another general statute amending Section 19 of the Act of April 28, 1855, so as to provide

that the board of supervisors, in establishing rates of toll to be charged by toll bridges, should not fix tolk at a rate so low as to make the income to the owners thereof less than 24 per cent per annum on the assessed taxable value of such ferry or toll bridge (St. 1863, ch. 504, p. 758).

On the same day, namely, April 27, 1863 (St. 1863 ch. 457, p. 734), there was approved a Special Act granting a franchise for a toll bridge across the Cosumnes River, near Michigan Bar. Section 2 reads in part:

"The parties holding the franchise granted under this Act may collect such tolls as the Supervisors of the County of Sacramento may or shall annually fix and determine; provided, however, the rate of tolls fixed shall not be so low as to prevent the owners of the franchise receiving 18 per cent per annum on the money actually invested \* \* \*."

The next Special Act was approved on April 2 1866 (St. 1865-6, ch. 532, p. 692). This Act granted a franchise for a toll bridge across the Feather River at Oroville. Section 4 reads:

"Upon the completion of said bridge said company may charge and collect such rates of toll as may be annually determined by the Board of Supervisors of the County of Butte under the laws of the State; but such tolls shall not be fixed at rates that will not yield 20 per cent on the actual costs of the construction of said bridge and the lands and appurtenances appertaining thereto

The last Special Act prior to 1872 was the Act of February 24, 1870 (St. 1869-70, Suppl., p. 18) which granted a franchise for a toll bridge and ferry across the Russian River near its mouth. The statute also made provision for the opening of a public highway and for the condemnation of lands, if necessary. Section 8 authorized the grantees to collect from persons using the bridge and ferry such rate of tolls as might be established by the Board of Supervisors of Sonoma County "which said rates shall raise a sufficient amount annually to pay 10 per cent per annum on the cost of constructing the said bridge and ferry, over and above necessary repairs and expenses of running the ferry \* \* \* "

The last legislative enactment in the series prior to 1872, was the General Statute of April 4, 1870 (St. 1869-70, ch. 581, p. 887). This statute authorized the boards of supervisors in the various counties to grant licenses for the construction of toll bridges across streams in their counties for periods not to exceed twenty years and also to grant licenses to maintain public ferries. Section 1 then proceeds as follows:

"\* \* \* and said Board shall have the right to prescribe the rates of toll, and change the same from year to year, as they may think proper, but previous to the first day of January, 1873, they shall not fix the rates of toll over any bridge or ferry constructed or licensed under the provisions of this Act so low as to make the net (income) less than twenty per cent per annum upon a fair valuation of such bridge or ferry and franchise,

and thereafter, not less than ten per cent per annum upon such valuation, which shall be made at the time in each year when such tolls are fixed

Thus, when the Political Code was enacted in 1872. the Legislature had had a long and interesting experience in connection with the granting of toll bridge franchises authorized either by General Statutes or by Special Acts. Beginning with the regulation of tolls by the courts of sessions and then by the boards of supervisors, without any limitation on their authority in the fixing of tolls, there gradually developed, beginning with the year 1862, a plan of regulation more calculated to induce private capital to go into the business of constructing and operating toll bridges. This was a plan by which the grantees of the toll bridge franchises secured contract rights wder which they were entitled to have the tolls not fixed so low as to make the net income less than a specified percentage per annum upon a specified base, whether the original cost or a subsequent valuation.

Gradually, the original types of franchises fell into disuse and the third type was adopted, either by general statutes applicable to all the boards of supervisors, or by Special Acts enacted by the Legislature itself. As has been noted, the last legislative Act prior to 1872 was the statute of April 4, 1870, providing that boards of supervisors granting toll bridge franchises, while having the right to prescribe the tells each year, were subject to the definite limitation that they could not fix the rates of toll so low as to make

the net income less than 20 per cent per annum prior to January 1, 1873, and 10 per cent per annum thereafter.

That was the most recent expression of the Legislature when the Political Code was enacted in 1872. What the Legislature did, in enacting Sections 2845 and 2846 of the Political Code, was to continue in effect the policy which had theretofore been evolved as the result of twenty years of experience in the granting of toll bridge franchises and to provide that although the boards of supervisors could pass upon the tolls each year, they should be subject to the very. definite limitation—a contract right in the grantees that they could not reduce the rates so low as to yield less than a specified rate of return. The rate of return, fixed in 1872 at 15 per cent, was a general average of the returns fixed during the preceding years and a definite average of the two figures of 20 per cent and 10 per cent specified in the last preceding statute on the subject.

Sections 2845 and 2846 of the Political Code are merely a recognition of the evolution of toll bridge franchise regulation from the earlier unlimited right of the boards of supervisors to fix such tolls as they might please to the later limitation of such right by appropriate contract protection accorded to the grantees of the franchises.

In the light of the historical background of legislative experience and evolution, we turn now to the

An analysis of the language of the contract shows the rights claimed by appellant.

specific language of said Sections 2845 and 2846 of the Political Code.

In view of the importance of this language, and is order to facilitate its analysis, we restate the same.

On February 5, 1923, the relevant portions of Section 2845 of the Political Code were as follows:

"The board of supervisors granting authority to construct a toll-bridge or to keep a public ferr, must at the same time:

- "2. Fix the amount of license tax to be paid by the person-or corporation for taking tolk thereon, not less than three dollars nor over one hundred dollars per month, payable annually.
- "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year; " \* " "

Section 2846 of the Political Code has at all times in and after 1872, read as follows:

"The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, t any time, unless it is shown to the salisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the

bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

That said two sections must be read together is clear. In fact, the first autence of Section 2846 says "as provided in the prece," ing section" and thus expressly ties the two sections together.

Section 2845 deals first with the first year. It provides that the Board of Supervisors granting authority to construct a toll-bridge must "at the same time" do two things:

- 1. Fix the amount of the license tax; and
- 2. Fix the rate of tolls.

The license tax is to be not less than \$3.00 nor over \$100.00 per month, payable annually.

The rate of tolls is to be so fixed that it shall not raise for the first year an income exceeding 15 per cent on the actual cost of the construction or erection, together with the maintenance of the bridge.

In both respects, the Board of Supervisors of Contra Costa County, in enacting said Ordinance No. 171, followed the provisions of said Section 2845. At the same time, and in the very ordinance itself, the Board inserted provisions as to both the license tax and the rate of tolls.

In one respect, said Section, 2845 also contains provisions with reference to the years following the first year. The Section provides, in Paragraph 3, that the rates of toll shall be so fixed that "for any succeeding

year" after the "first year" they shall yield not to exceed 15 per cent "on the fair cash value" of the bridge, together with the repairs and maintenance thereof. For the first year, it will be remembered the 15 per cent was to be "on the actual cost of the construction or erection" whereas in succeeding years the 15 per cent is to be "on the fair cash value" of the bridge.

This distinction is quite logical. During the first year after the completion of the toll bridge, the amount of money expended in the construction of erection of the bridge is still readily obtainable and it may be assumed that such amount will represent the fair value of the bridge at that time. In subsequent years, other elements, such as amounts to be set aside for depreciation and amortization and changing levels of the cost of wages and materials, enter into the problem, so that for those years the rate base is to be the "fair cash value."

Turning now to Section 2846, this Section deals with the remaining nineteen years of the first twenty years of the life of the bridge. This Section provides that in those years the "license tax" shall not be "increased" and the "rate of toll" shall not be "diminished"

"unless it is shown to the satisfaction of the board of supervisors that the receipts from tolks in any year is disproportionate to the cost of construction or erection, or the fair cash value there of, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

As to the meaning of the word "disproportionate" we need only turn to Section 2845, in which the Legislature itself laid down the *standard* or *rule* to be applied in determining whether or not the receipts from tolls in any one year have become "disproportionate."

Construing Sections 2845 and 2846 together, it is clear that what the Legislature had in mind was that tolls which yield up to 15 per cent on the cost of construction or erection, or the fair cash value thereof, together with the necessary repairs and maintenance, are not to be regarded as "disproportionate" but that if and when the yield becomes more than 15 per cent it will be deemed to be "disproportionate." In the latter event, even though this situation should develop within less than twenty years after the effective date of the franchise, the board of supervisors would have the right, under the contract, to reduce the tolls in the manner specified in the appropriate sections of the Political Code.

This does not mean that American Toll Bridge Company is at this time necessarily entitled to a 15 per cent return. The record shows, and it is conceded, that the Company has never earned anywhere near a 15 per cent return (96 Cal. Dec. 367, 373; R. 128). Also, under its contract the Company has no right to increase its tolls so as to secure a yield of 15 per cent.

The statement in the opinion of the Supreme Court of California that it is appellant's position that the provisions of said Sections 2845 and 2846 of the Po-

litical Code "amount to an irrevocable contract for a minimum annual percentage of return to the pentioner" (96 Cal. Dec. 367, 374; R. 130) is entirely without justification. Appellant has never made such claim.

The Company's contract right is that the tolls specified by the Board of Supervisors of Contra Costa County, either originally or by subsequent action of the board taken under and in accordance with the previsions of said Sections 2845 and 2846 of the Political Code, shall not be diminished by any public authority unless it should appear that the yield from the tolk then in effect has become in excess of 15 per cent. It the yield is less than 15 per cent, appellant must be content with such lesser yield; but the public authorities may not reduce the rates which yield such lesser return.

The Railroad Commission has itself conceded that appellant's construction of the meaning of the words of said Sections 2845 and 2846 is correct. While differing from appellant as to the legal effect of the language, the Commission's counsel have agreed with appellant as to the meaning of the language of said Sections 2845 and 2846. Counsel for the Commission have taken the following position (R. 150-1):

"It may be conceded that the intent of Section 2845(3), when read together with Section 2846 and in the light of the earlier statutes, is that the boards of supervisors should not at any time during the life of the franchise . . . so reduce the tolks

as to fail to yield the grantee a return of 15 per cent on the cost of construction or on some other valuation of the property exclusive of the franchise itself."

While the Commission contends that said language, so construed and interpreted, is the language of "regulation," as distinguished from the language of "contract," we are satisfied that the Commission is in error on this point. We shall address ourselves to that matter in a subsequent portion of this Brief. Our purpose at the present time is to point out that as far as the meaning of the language of Sections 2845 and 2846 is concerned, the Commission has conceded that our view is correct.

The contract right on which we here rely is one of transcendent importance to investors in the securities of toll bridge companies. The Legislature protected the investors by itself setting the standard of what it meant by the word "disproportionate" so as to prevent regulating authorities from following their own passing whim or fancy as to what they could do:

The facts of this case give pointed significance to the wisdom of the Legislature in itself definitely setting the standard to be followed by the public authorities.

Here we have a case in which several thousand Californians purchased stock of American Toll Bridge Company at \$2.00 per share in cash (Coleman, R. 345). From the date of the opening of the Carquinez

Bridge on May 21, 1927, up to December 31, 1935, the stockholders received no dividend whatever on their stock. Approximately one-half the life of the Carquinez and Antioch Toll Bridge franchises expired before the first dividend was declared.

Now, when the time has come when the stockholders might reasonably expect some return to compensate them, in part, for their sacrifices in the past, the Rairroad Commission comes along and, in frank disregard of the contract rights claimed by appellant, proceeds to establish a rate of toll as low as it believes that the decisions of this Court bearing on the issue of confication will permit, in cases in which there is no contract right.

If the men and women who originally invested thermoney in the Carquinez Bridge, in reliance on the contract which they believed the Company had with the State of California, had had any premonition that the public authorities would take such action just a soon as the Carquinez Bridge should begin to show earnings available for dividends, we may be reasonably sure that this great pioneer enterprise, which has so distinctly served the public convenience, would never have been constructed.

We respectfully submit that ordinary fairness, as well as the law of the land, require that the public authorities shall respect and comply with contracts entered into in good faith for the construction of great public enterprises.

8. The Supreme Court of California misinterpreted the language of the contract.

Turning now to the decision of the Supreme Court of California, we respectfully submit that said decision makes a patently incorrect analysis of said provisions of Sections 2845 and 2846 of the Political Code, in so far as they form part of the contract between the State of California and appellant.

Referring to appellant's position that said Sections 2845 and 2846 accorded to appellant the contract rights which it claims, the Supreme Court of California said (96 Cal. Dec. 367, 373; R. 128):

"This construction, however, fails to give full import to the language of the section (Section 2846) which prohibits either an *increase* or a reduction in the tolls unless the receipts are shown to be disproportionate."

Continuing, the court said:

"The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with any intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much."

The above analysis and reasoning are the foundation on which the court erected the conclusion that the language on which appellant relies is not the language of contract. We now draw this Court's attention specifically to the fact that the above analysis and reasoning and the conclusion based thereon are fatally defective for the reason that the court has failed to give proper effect to the distinction between *license tax* and the rate of toll and has, accordingly, entirely misconstrued the language of the first sentence of said Section 2846.

Section 2845(2) refers to the amount of the license tax. The court made no reference to that paragraph and its failure to do so may perhaps account in part for its misconstruction of the first sentence of Section 2846.

Section 2845(3) refers to the rate of tolls. We thus have two separate paragraphs of Section 2845 referring separately to these two different items — the license tax and the tolls.

Then comes Section 2846, the first sentence reading as follows:

"The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it be shown to the salisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

Without noticing the distinction between the licens tax and the rate of toll, the Supreme Court of Cal

fornia erroneously held that the words "increased" and "diminished" each applies to both the license tax and the rate of toll and on that erroneous foundation reached the conclusion that we have here a flexible system of ups and downs in the rate, which can spell only a system of flexible regulation by public authority as distinguished from fixed contract rights.

The court's error apparently arose for the court's error

If the court's construction that the words "increased" and "diminished" both apply to "rate of tolls" and also to "license tax" is correct, then note the following results:

- (1) It would follow that the *license tax* cannot be *diminished* unless the yield becomes disproportionate (i.e., in excess of 15 per cent): but that is the very time when, by reason of more moneys in the treasury, the toll bridge company could pay a *higher* license tax.
- (2) Likewise, it would follow that the rate of toll cannot be increased unless the yield becomes disproportionate (i.e., in excess of 15 per cent): but that is the very time when, by reason of higher earnings, the rate of toll should be diminished, not increased.

The Legislature, of course, could not have intended any such results.

It seems very clear to us that the proper construction must be as follows:

(1) The license tax must not be increased upless the yield becomes in excess of 15 per cent. In such event, the company has more money and can pay a higher license tax. But, in order to prevent excessive license taxes at such times, the last sentence of Section 2846, which is also over looked in the court's opinion, provides:

"The license tax-fixed by the board of supervisors must not exceed ten per cent of the tolk annually collected."

(2) The rate of tell must not be diminished unless the yield becomes in excess of 15 per cent. In that event, fairness to the public requires that the tells be reduced so that the yield shall not be in excess of 15 per cent, that being the standard of reasonableness established by the Legislature

Section 2846 does not provide for any increase at the rate of tolls after they are first written into the ordinance granting the franchise. The investor must be assumed to enter upon the project with his ever open. If the rate of tolls written into the ordinance at the time of its adoption by the board of supervisors will not, in the opinion of the proposed toll bridge owner, yield a satisfactory return, he simply declines to accept the franchise; but if he accept the franchise and constructs the bridge, he must take the consequences if the tolls fail to yield the expected revenue.

On the other hand, the common dictates of fair play require (and the statute, as we believe it must be interpreted, provides), that he has a contract right not to be deprived of a reasonable return under the standard written into the contract by the Legislature, if the volume of the traffic should confirm his original expectations.

The authorization of such a contract by the Legislature is entirely consistent with the proper demands of public policy. An intending toll bridge constructor has a measure of protection in the event the project is successful and the public has the assurance that the tolls will be reduced in the event the yield becomes greater than that specified under the standard of reasonableness of tolks established by the Legislature. The public thus has the protection referred to by the Supreme Court of California "to be charged not more than a reasonable toll for the use of the bridge" (96 Cal. Dec. 367, 373; R. 128).

· Under such a policy, a tremendously hazardous and difficult project such as the Carq z Bridge can be constructed.

Without the contract rights which they thought they were securing, no investors of ordinary common sense would ever have risked their money in such an enterprise. The Carquinez Bridge, the pioneer of all the San Francisco Bay Bridges, would never have been built by private capital.

We believe that the error of the court's construction of Section 2846 is so clear that further comment would be unwarranted. And with that erroneous construction there falls also the court's conclusion erected thereon, to the effect that the language of Sections 2845 and 2846 of the Political Code, when read into the contract between the County of Contra Costa and the petitioner, is not the language of contract.

 The authorities cited by the Supreme Court of California do not support the Court's conclusion.

After making what we believe to be an entirely erroneous analysis of the language of said Sections 2845 and 2846 of the Political Code, the Supreme Court of California then referred to a number of decisions of this Court in support of this mustaken conclusion. However, on analysis, it appears that not one of these decisions supports the conclusions of the Supreme Court of California.

In Spring Valley Water Works v. Schottler, 110 U. S. 347, the question was simply whether the people of California had reserved power to enact legislation which would have the effect of amending a provision of the charter of a California corporation.

Section 31 of Article IV of the original Constitution of California, adopted in 1849, read as follows:

"Corporations may be formed under general laws, but shall not be created by special actericept for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Spring Valley Water Works was incorporated under the Act of April 22, 1858, entitled "An Ad

or the incorporation of Water Companies" (St. 1858, h. 262, p. 218). Section 4 of said Act provided, in art, that the water rates to be charged by corporations incorporated under said Act should be determined by a board of commissioners of whom two numbers were to be selected by the municipal authorities, two by the corporation and the fifth, if necessary, by said four.

In 1879, the people of California adopted a new constitution, including Section 1 of Article XIV probling, in part, that water rates shall be fixed by the gislative bodies of the municipalities, including the part of supervisors of a city and county. The Board of Supervisors of the City and County of San Franseco thereafter claimed the right to fix the water stee to be charged by Spring Valley Water Works. The corporation claimed that it had a contract right to have its rates fixed by a board of commissioners accordance with said Section 4 of the statute under bich it was incorporated and brought mandamus to empel the Board of Supervisors to fill a vacancy on the board of commissioners.

It will be noted that the provision, under which be corporation claimed, was a part of the very Act ander which the corporation was incorporated and the Constitution of 1849 had expressly provided at "all general laws and special acts passed puraant to this section (relating to the formation of reporations) may be altered from time to time, or pealed".

This Court, of course, held that the case fell within the familiar rule that the State may amend or repeal a corporation's articles of incorporation, where power so to do had been reserved. Where such reserve power exists, the corporation cannot successfully claim that the provisions of its articles constitute a contract with the State, immune from subsequent alteration by the State.

At page 352, Mr. Chief Justice Waite said:

"The Spring Valley Company is an artificial being created by or under the authority of the legislature of California. The people of the State, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times toalteration or repeal. The reservation of power to alter or repeal the charters of corporations was not new, for almost immediately after the judgment of this court in the Dartmouth College Case (Dartmouth College v. Woodward, 4 Wheat. · 518), the States, many of them, in granting charters acted on the suggestion of Mr. Justice Story in his concurring opinion (p. 712), and inserted provisions by which such authority was expressly retained. Even before this decision it was intimated by the Supreme Judicial Court of Massachusetts in Wales v. Stetson, 2 Mass. 143, that such a reservation would save to the State its, power of control. In California the Constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute .. extinguishment as a corporate body."

Continuing, this Court said (p. 355):

"The question here is not between the buyer and the seller as to prices, but between the State and one of its corporations as to what corporate privileges have been granted. The power to amend corporate charters is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with authority to make them."

In conclusion, this Court said (p. 356):

"It (the provision for fixing rates) was a condition attached to the franchises conferred on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal."

In the present case, there is no issue whatever with reference to the amendment or repeal of any provision of the articles of incorporation of American Toll Bridge Company. The decision in the Schottler case has never been challenged but the case is simply not in point here.

Stanislaus County v. San Joaquin and King's River Canal and Irrigation Company, 192 U. S. 201, is another case on the same point and is equally inapplicable.

The Canal and Irrigation Company was a California corporation incorporated under the Act of May

14, 1862 (St. 1862, ch. 417, p. 540) entitled "An Act to authorize the Incorporation of Canal Companies and the Construction of Canals". Section 3 of the Act read as follows:

"Sec. 3. Every company organized as afore-said shall have power, and the same is hereby granted, to make rules and regulations for the management and preservation of their works, not inconsistent with the laws of this State, and for the use and distribution of the waters and the navigation of the canals, and to establish, collect and receive rates, water rents, or tolls which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested."

It will be noted that the provision for a return of not less than 1½ per cent per month was here incorporated into the very act of incorporation itself. It was thus part of the corporation's charter.

On March 12, 1885, there was approved an Act (St. 1885, ch. 115, p. 95) providing, among other matters, that the boards of supervisors in the respective counties should fix water rates so as to yield a net return of "not less than six nor more than eighteen per cent" upon the specified rate base.

It will be observed that this statute amended and changed the above-quoted provision of the Act under which the corporation was incorporated, by providing for a return as low as six per cent.

The Board of Supervisors fixed rates which yielded a rate of return substantially lower than the one and one half per cent per month specified in the statute under which the corporation was incorporated. The corporation then applied to the Federal Courts for an injunction. This Court directed that a favorable judgment of the U.S. Circuit Court be reversed and that the bill be dismissed without prejudice.

This Court, in a decision by Mr. Justice Peckham, first held that the above-quoted provision from the Act under which the corporation was incorporated was not intended by the State as a contract (p. 211).

Continuing, this Court said (p. 211):

"Second. But assuming there was a contract, we think the rates could be changed under that provision of the constitution of the State adopted in 1849, article 4, section 31, which provided:

""(Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

"This court has had frequent occasion to discuss the meaning and extent of the power thus reserved, as it exists in about all the States, either by constitutional or statutory provisions."

After reviewing a number of the Court's earlier decisions, this Court concluded on this point as follows (p. 213):

"\* \* \* and we are quite clear that, even assuming there was a contract, the legislature nevertieless had the power to so alter and amend the act of 1862 (the act of incorporation) as to provide for the fixing of rates as set forth in the act of 1885."

It thus appears that this case, also, is one of the reserved power of the Legislature to amend the laws under which corporations are incorporated and that the case is not in point here for the reason that there is here no question whatever as to repeal or amendment of any provision of the articles of incorporation of American Toll Bridge Company. The Company here claims under sections of the Political Code which have nothing to do with the articles of incorporation of any corporation.

In Railroad Commission of California v. Los Angeles Railway Corporation, 280 U. S. 145, the question was whether the State of California had authorized the City of Los Angeles to write into street railway franchise ordinances provisions as to rates of fare, which should have the force of contract and should be binding on the State as well as the City. The Railroad Commission and the City of Los Angeles took the position that the State had granted such authority and that the Street Railway Company was, accordingly, precluded by contract from increasing its incent fares. The Street Railway Company insisted that the asserted authority had not been granted by the State to the City and prevailed on that issue.

This Court recognized fully the power of the State to grant such authority to municipalities and other

political subdivisions of the State. On this subject, the Court, speaking through Mr. Justice Butler, said (p. 151):

It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. Detroit v. Detroit Citizens' R. Co., 184 U. S. 368, 382. Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508, 515. Public Service Co. v. St. Cloud, 265 U. S. 352, 355. And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. Detroit v. Detroit Citizens' R. Co., supra, 389."

However, the Court found that on the facts of that case, the State had not granted such authority to the City of Los Angeles. The Court reached this conclusion following examination of certain provisions of the Civil Code, the Broughton Act and the charter of the City of Los Angeles (pp. 153-156). The language of these provisions is widely different from the provisions of Sections 2845 and 2846 of the Political Code which are determinative on this point in the present case.

The question at issue in the Los Angeles Railway Corporation case was whether the State had conferred

on a political subdivision the authority to make a cotain contract on the subject of rates or fares. In the present case, the issue is entirely different. The State here had clearly conferred on the County of Contri Costa authority to enter into a franchise contract. There is no question here as to whether the State had authorized a political subdivision to write into the contract the crucial words in the present case; for the reason that said words were not written into the contract by the Board of Supervisors. They were written into it by the State itself, acting through its Legislature. The Board of Supervisors had nothing to do with said words. They were written into the contract by the State itself and were provided for when the State enacted said Sections 2845 and 2846 of the Political Code.

Hence there is here involved no question as to whether or not the State had delegated to a political subdivision the authority to write words of contract into a franchise ordinance.

The act was that of the State itself. And it has not even been argued, much less demonstrated, that the State itself lacked authority to do what it did.

Under the circumstances, the Los Angeles Railwow Corporation case is not in point on the issue now before this Court.

In Home Telephone and Telegraph Company of City of Los Angeles, 211 U.S. 265, this Court found that on the facts of that case the Legislature had not conferred upon the City of Los Angeles the power to

contract with reference to telephone rates. Speaking through Mr. Justice Moody, the Court, at page 273, states the rule as follows:

"It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 382; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508."

Here, as in the Los Angeles Railway Corporation case, supra, the question at issue was whether the Legislature had delegated to a political subdivision of the State of California the right to contract with designated classes of public utilities with reference to the rate of fare or toll. As we have hereinbefore pointed out, the question now before this Court is quite different, for the reason that the language here under consideration (Sections 2845 and 2846 of the Political Code) was written into the contract not by the subordinate political agency but by the Legislature itself. In the case now before this Court, no question arises with reference to the authority of a political subdivision. We do not believe that anyone will challenge the right of the Legislature itself to enact the provisions here under consideration and to make them a: part of a franchise contract.

In Covington and Lexington Turnpike Road Company v. Sandford, 164 U. S. 578, the governing facts were quite different from those which are set forth in the reference made by the Supreme Court of California to that decision (96 Cal. Dec. 367, 3734; R. 129).

It appeared that Covington and Lexington Turipike Road Company was incorporated by an Act of the Legislature of Kentucky approved on February 22, 1834, with authority to construct and permanently maintain a turnpike road from Covington to Lexington, Kentucky. By the nineteenth section of the Act, the company was authorized to collect certain specified tolls. Section twenty-six provided as follows (p. 581):

"That if at the expiration of five years after said road has been completed, it shall appear that the annual net dividends for the two years next preceding the said company, upon the capital stock expended on said road and its repairs, shall have exceeded the average of fourteen per cent per annum thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll-so that it shall give that amount of net dividends per annum, and no more." Acts of Kentucky, 1833, pp. 537, 548.

The Tumpike Company contended and this Court agreed that said section twenty-six was part of the defendant's contract with the State and that it granted to the Tumpike Company a contract right to the earning therein specified (pp. 581, 586).

The questions before this Court in that case arose out of subsequent statutes by which two new turnpike corporations were later incorporated and the turnpike company to whom the above rights had been granted in 1834 passed out of existence. The question at issue was simply whether or not the above contract rights had passed over to the two new corporations. The Court found that the situation as to the two new corporations was entirely different from the situation as to the original corporation and that the Legislature had not provided that the two new corporations should have contract rights similar to those of the original corporation.

At page 586, the Court, speaking through Mr. Justice Harlan, states the question at issue as follows:

"Was the Covington and Lexington Turnpike Road Company entitled, under its charter, to be exempt from legislation that would prevent it from earning at least fourteen per cent 'upon the capital stock expended upon said road and its repairs', as prescribed in the act of 1884?"

Referring to said question, the Court said (p. 586):

"The act of 1834 having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851 and which, by the terms of that act, succeeded 'to all' the powers, rights

and capacities' granted by the act of 1834 to the original corporation."

This Court here found very definitely that that Act of 1834 gave to the original turnpike corporation an exemption or immunity from legislation which would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs. Basing its decision on that as sumption, the Court then went on to consider the entirely different question as to whether or not the Legislature had granted these contract rights to the two new turnpike companies. This question the Court answered in the negative.

The entire decision proceeds on the assumption, that section twenty-six of the Act of 1834 formed part of the contract between the Turnpike Company and the State and that the Turnpike Company's rights under said contract were entirely valid. Under said decision, there is no question that said contract rights would have continued in full force and effect had it not been for the entire change in circumstances under which two new turnpike companies were created and the old company went out of existence without any action by the Legislature clearly conferring on the two new turnpike companies the contract rights which had been originally conferred upon the first turnpike company.

Hence, the Covington case, instead of being authority to support the decision of the Supreme Court of California, has the very opposite effect.

The above cases are the only cases relied on by the Supreme Court of California in support of its conclusion on the issue of impairment of contract obligations. We respectfully submit that none of these cases, when properly considered, supports the conclusion reached by the Supreme Court of California.

10. The Supreme Court of California failed to give effect to the decisions of this Court and other Federal courts which sustain the authority of a State legislature to grant or authorize the granting of contract rights, equally binding on both parties, as to the rates to be charged by common carriers or public utilities.

While it is, of course, true that the surrender by contract of a power of government will be closely scrutinized (Home Telephone and Telegraph Company v. City of Los Angeles, 211 U. S. 265, 273), it is also true that the reports of the decisions of this Court and other Federal courts are full of cases in which the court recognized the authority of the legislature to make, or to authorize the making of, contracts containing definite public utility rates or fares which could not be changed by public authority during a specified reasonable time, or only if the yield should become greater than the one specified in the contract, and found that on the facts of the case such contract had been lawfully entered into.

Among these cases are the following decisions of this and other Federal courts:

Los Angeles v. Los Angeles City Water Company, 177 U. S. 558;

Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 338, 382, 384, 386; City of Cleveland v. Cleveland City Railway Company, 194 U. S. 517;

Vicksburg v. Vicksburg Waterworks Company, 206 U. S. 496, 508:

City of Minneapolis v. Minneapolis Street Rollway Company, 215 U. S. 417, 436;

Detroit United Railway v. State of Michigan, 242 U. S. 238, 251, 253;

Columbus Railway, Power & Light Company, c. City of Columbus, 249 U. S. 399, 409-10;

St. Cloud Public Service Company v. City of St. Cloud, 265 U. S. 352, 359-64;

Omaha Water Co. v. City of Omaha, 147 Fed.1: Columbus Railway, Power & Light Co. v. City of Columbus, 253 Fed. 499, 503-5;

Hillsdale Gaslight Co. v. City of Hillsdale, 28 Fed. 485, 487-8;

Nebraska Gas & Electric Co. v. City of Stromsbury, 2 Fed. (2d) 518, 521-2;

Cincinnati, N. & C. Ry. Co. v. City of Cincinnati, 71 Fed. (2d) 124, 125.

We invite the Court's particular attention to the first of the above cases, Los Angeles v. Los Angeles City Water Company, 177 U. S. 558. In that case it appeared that in 1868 the City of Los Angeles leased to Griffin and two associates its water works for a term of thirty years and granted the right lay pipes in the streets and to take water from the less Angeles River. The ordinance contained the following proviso (p. 570):

"Always provided, that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

On April 2, 1870, the Legislature passed an Act in terms ratifying and confirming said contract (p. 571). In this respect, the case is similar to that now before this Court, in which, as we have shown, it appears that the Legislature of California, about two months subsequent to the enactment of Ordinance No. 171, enacted legislation expressly ratifying and confirming the franchise granted by said Ordinance (St. 1923, ch. 131, p. 272).

In holding that the above contract was valid and that the City of Los Angeles was precluded by its contract from reducing water rates to a point below those which were being charged at the time when the contract was entered into, this Court, speaking through Mr. Justice McKenna, said (p. 570):

"We think, therefore, the power to regulate rates was an existent power, not graited by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation but in the limitation upon it."

So, in the present case, the contractual element is found in the *limitation* upon the power of regulation of appellant's tolls, i. e., in the contract provision that the Board of Supervisors should not reduce the tolks unless it first be found that they were yielding a return in excess of 15 per cent upon the specified rate base.

When the Railroad Commission stepped into the shoes of the Board of Supervisors of Contra Costa County as the public agency to regulate the tolk charged by American Toll Bridge Company, it did so subject to the express contractual limitation upon the rate making power established by the contract between the State of California, acting through the Board of Supervisors of Contra Costa County, and appellant's assignor.

The above listed cases are principally cases in which the question at issue was whether or not the Legislature could confer on a subordinate political subdivision authority to enter into a binding contract is to common carrier or public utility rates for a reasonable period of time.

As already pointed out, the case now before this Court is even simpler, for the reason that the determining language of the contract was written into a not by a subordinate political agency, but by the Legislature itself, when it enacted Sections 2845 and 285 of the Political Code.

We are unable to find in the decision of the Supreme Court of California any reference to this distinction nor anything to show that the court understood that the present case is one in which there can be no question of the authority of the Legislature to act.

In the present case, there is no intermediate hurdle resulting from a question as to whether or not the Legislature had authorized a subordinate political agency to enter into a particular contract or to insert into a contract particular terms and conditions.

On the other hand, as we have hereinbefore pointed out, this Court, in the Covington case, supra, assumed, as the foundation for its decision, that a statute providing for a yield up to 14 per cent per annum conferred upon the Turnpike Company a contract right not to have the existing rates reduced unless that yield was being exceeded.

Company, 93 Fed. 513. In that case, it appeared that a railroad charter granted "the right to receive and collect toll or compensation at such rates as the directors may, from time to time, prescribe and establish, for the conveyance and transportation of all passengers and freight over their road, or any part thereof". It was provided, however, that the Supreme Court of Vermont might alter said rates "for a term not exceeding ten years at any one time, as said court may judge reasonable, and in such manner that the income of said company shall not be reduced below twelve per cent per annum on the amount of its capital stock, after deducting all expenses (p. 514).

The court held that this charter provision constituted a contract between the State and the Railroad Company and in this connection said (p. 516):

"The contract between the state and the predecessor of the defendant railroad company here for the building and operating this road was that the corporation should always have the right to demand and receive such fares as the directors might fix, which could be reduced by the Supreme Court of the state only, and not below 12 per cent. on the capital stock. This rate is large, but the risk was great; and the limit was fixed, in view of the whole, by the legislative discretion."

Bearing on the volume of the rate, we desire to point out that in our case, also, the risk was great. It was, no doubt, in recognition of this fact; as applied to such toll bridges as might thereafter still be constructed in California, that the Legislature, when as late as 1923, it amended Section 2845 of the Political Code in minor respects, retained the 15 per cent provision (St. 1923, ch. 141, 288).

It is thus evident that the Supreme Court of Calfornia failed to give effect to the decisions of this Court and of lower Federal courts sustaining the authority of a State legislature to enter into, or authorize the entering into of, contracts naming specified rates or fares or rates of return and to the decisions upholding such contracts in situations analogous to the present case. 11. The order of the Railroad Commission of California impaired the obligations of appellant's said contract, in violation of appellant's rights under Section 10 of Article I of the Constitution of the United States.

#### We have shown:

- (1) That, as decided by the Supreme Court of California in County of Contra Costa : American Toll Bridge Company, 10 Cal. (2d) 359, said Ordinance No. 171 constitutes a contract, in which the parties "agree" to its provisions and that it is obviously unfair to hold that appellant is bound by the burdens of the contract but may not avail itself of its benefits;
- (2) That the provisions of said Sections 2845 and 2846 of the Political Code of California were read into and became a part of said contract;
- (3) That there is agreement between the Railroad Commission and appellant as to the meaning of said Sections 2845 and 2846 to the effect "that the boards of supervisors should not at any time during the life of the franchise . . . . so reduce the tolls as to fail to yield the grantee a return of 15% on the cost of construction or on some other valuation of the property exclusive of the franchise itself" and that the only disagreement between said parties is with reference to the legal effect of said language;
- (4) That the legislative history of toll bridge construction and operation in California preceding and leading up to the enactment of said Sections 2845 and 2846 of the Political Code shows that it was the intention of the Legislature, in enacting said sections,

to protect, by contract rights, the grantees of toll bridge franchises.

- (5) That the plain meaning of the provisions of said Sections 2845 and 2846 of the Political Code is that contract rights are offered to such grantees and that, unless so construed, said words merely constitute a "delusion and a snare";
- (6) That the construction placed upon said provisions by the Supreme Court of California was the result of an obvious error as to the meaning of the words; and
- (7) That in all of its legislation relating to toll bridge corporations subsequent to 1872, the Legislature has been careful to preserve to toll bridge owners all rights granted to them by the franchise ordinances enacted under said provisions of the Political Code.

The record in this case shows and the Supreme Court of California found that at no time has the income from the Carquinez Bridge equalled "the designated 15 per cent" (96 Cal. Dec. 367, 373, R. 128).

As the appellant had a contract right not to have its existing tolls reduced unless they had first been found to yield in excess of 15 per cent on the specified rate base, we respectfully submit that the Railroad Commission's order clearly impaired the obligation of appellant's contract, in violation of appellant's rights under Section 10 of Article I of the Constitution of the United States:

### II.

## PROCEDURAL DUE PROCESS.

We next submit that the *procedure* of the Railroad Commission constituted a denial of *procedural due* process of law for each of the reasons which we shall specify.

In using the words "procedural due process", we use them as they were defined by this Court, speaking through Mr. Chief Justice Hughes, in Railroad Commission of California v. Pacific Gas and Electric Company, 302 U. S. 388, as follows (pp. 392-3):

"procedural due process, that is, whether the Commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution."

We have in mind that this Court has frequently found that orders of various administrative tribunals, Federal and State, were void because the procedure of the tribunal failed to accord procedural due process. Among the more recent of these decisions are the following:

Northern Pacific Railway Company v. Department of Public Works of the State of Wash-comments in Railroad Commission of California v. Pacific Gas and Electric Company, ington, 268 U. S. 39, 44-45 (see approving 302 U. S. 388, 399, 415-16);

Chicago, Milwaukee & St. Paul Railway Compley v. Public Utilities Commission of the State of Idaho, 274 U. S. 344, 350-1 (see approxing comments in 302 U.S. 388, 309)

West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 2), 294 U. S. 79, 812;

West v. Chesapeake & Potomac Telephone Company, 295 U. S. 662, 675, 679 (see approving comments in 302 U. S. 388, 39940, 417-18);

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 300, 34, 307.

Morgan v. United States, 304 U. S. 1, 22; and on Petition for Rehearing, p. 23.

We understand that where the case presents issues of both (a) procedural due process and (b) confiscation, the Court first examines the issue of procedural due process. If the Court finds a denial of procedural due process, the Court reverses the judgment or decree without going further to analyze also the facts bearing on the issue of confiscation. See each of the cases next hereinbefore cited.

On the other hand, if in such case the Court finds that there has been no denial of procedural due process, it then addresses itself to the issue of confiscation.

Railroad Commission of California v, Pacife Gas & Electric Company, 302 U.S. 38. 393-4;

United Gas Public Service Co. v. Texas, III U. S. 123, 138, 142.

We shall follow the Court's usual approach by culsidering, first, the issue of procedural due process and, next, the issue of confiscation. In so doing, however, we express the opinion that the case may and should be decided in favor of appellant without the necessity of analyzing the facts bearing on the issue of confiscation.

#### A.

A THE PROCEDURE OF THE RAILROAD COMMISSION CONSTI-TUTED A DENIAL OF DUE PROCESS OF LAW UNDER THE PRINCIPLES MOST RECENTLY STATED BY THE COURT IN MORGAN v. UNITED STATES, 304 U. S. 1.

We believe that this is an appropriate case in which the Court may declare that the principles of procedural due process of law, as most recently declared by this Court in the great decision in Morgan v. United States, 304 U.S. 1, in the case of a Federal administrative official, are equally applicable to the procedure of State administrative tribunals.

# 1. The Morgan case.

In Morgan v. United States, 304 U. S. 1, decided on April 25, 1938, the question at issue was the validity of an order of the Secretary of Agriculture fixing the rates to be charged by market agencies at the Kansas City stockyards. The question arose under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. A., sec/181-229.

In holding that the requirements of procedural due process of law had not been met, this Court, speaking through Mr. Chief Justice Hughes, pointed out that "in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall

be protected by the rudimentary requirements of for play" (pp. 14-15).

Continuing, Mr. Chief Justice Hughes stated the crux of the decision as follows (pp. 18-19):

"Those who are brought into contest with the Government in a quasi-judicial proceeding used at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

The Court then examined the procedure before the Secretary of Agriculture in order to determine whether or not the appellants "in their contest with the Government in a quasi-judicial proceeding aimed at the control of their activities" had or had not been "fairly advised of what the Government proposes" and whether or not they had been "heard upon its proposals before it issues its final command".

As bearing on said questions, which constituted the real issue in the case, this Court naturally addressed itself primarily to the question whether or not the issues had been properly defined. That would be the normal and usual way of advising "what the Government proposes".

In pursuing its inquiry, the Court found (p. 19):

- (1) The proceeding was initiated by a mere notice of inquiry into the reasonableness of appellant's rates;
  - (2) No specific complaint was formulated:

- (3) There was no report by an examiner and no proposed findings were served by the Government;
- (4) While there was oral argument, counselfor the Government did not adequately state the Government's claims; and
  - (5) The Government did not file a brief.

Based upon that analysis of the procedure, the court concluded that appellants had not been advised of what the Government proposed and had been denied due process of law (pp. 19, 22).

At page 20, the Court stressed the point that in all substantial respects the Government was prosecuting the proceeding and that "the proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other". In such a proceeding, said the Court, the appellants are entitled

"to have a reasonable opportunity to know the claims advanced against them" (p. 21).

At page 22, the Court concluded:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these

multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

As the procedure before the Secretary failed to accord procedural due process, the decree of the District Court upholding the Secretary's order, was reversed (p. 22):

We understand the decision to mean that in a quasijudicial proceeding instituted by the Government
against a public utility it is the duty of the Government, in some appropriate way, to advise the party
lagainst whom the Government is proceeding "of
what the Government proposes" and to give him, a
fair opportunity "to be heard upon its proposals
before it issues its final command".

In ascertaining whether or not that requirement has been met, the Court naturally asks itself the following questions:

Were the issues defined in the usual way by com-

If not, did counsel for the Government advise what the Government proposed by some statement at the hearing or in oral argument?

If not, did counsel give the requisite information a brief?

If not, did the administrative tribunal serve proposed findings or an intermediate report?

If not, aid the Government, in any other way, announce "its proposals before it issues its final command?"

In the Morgan case, the Government had done none of these things. As we shall shortly show, in the case now before this Court, the Railroad Commission did none of them: On this issue of procedure, the two cases are completely identical.

This Court did not say that procedural due process necessarily requires the service of proposed findings or an intermediate report. Such findings or report, it is true, would be one way to meet the requirements of procedural due process, even though no complaint and answer had been filed. However, in the absence of such findings or report, the Government could still meet the requirements of procedural due process in some one of the other ways hereinbefore specified. However, neither in the *Morgan* case nor in the present case were these requirements met in any way whatever.

On May 16, 1938, this Court decided the case, of National Labor Relations Board v. Mackay Radio & Telegraph Company, 304 U. S. 333. In that case, the requirements of procedural due process had been met in three different ways, as follows:

# (1) Complaint and answer.

The rules of the National Labor Relations Board provide that formal proceedings are instituted through the filing and service by the Board of a formal complaint, to which is attached a copy of the charge. The

respondent then files a formal answer (Rules and Regulations, National Labor Relations Board, Series 1 as amended, Article II, Sections 5-10). In the Mackey case, this procedure had been followed. The Board had filed a formal complaint, to which the respondent had filed a formal answer. After the completion of its testimony, the Board filed an amendment to the complaint. The respondent filed a general denial to the amended complaint and presented its evidence (p. 340). It thus appears that there is no possible question but what the issues had been formulated by formal complaint and answer.

#### (2) Oral argument.

The Court specifically pointed out that "oral argument was had" (p. 350), at which time it may be assumed that counsel for the Government again stated the Government's proposals.

## (3) Brief.

Likewise, briefs were filed prior to the decision of the Board (p. 350).

Under these circumstances, this Court, of course held that the mere failure of the Board to follow its usual practice of submitting a tentative report by a trial examiner and of hearing exceptions to such report did not deprive respondent of procedural disprocess. As this Court, speaking through Mr. Justice Roberts, said (p. 351):

"The Fifth Amendment (here the Fourteenth Amendment) guarantees no particular form of

procedure; it protects substantial rights. Compare-Morgan v. United States, 298 U. S. 468, 478."

In the Morgan case and in the present case, however, in no way whatever did the Government formulate any issues or give advice "of what the Government proposes".

On May 31, 1938, this Court rendered and filed is decision on the petition of the Government for a rehearing in the Morgan case (304 U. S. 23-26). The Court again emphasized the crux of its decision in the Morgan case by restating the language hereinbefore quoted by us, as follows (p. 25):

"We said

Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

'No such reasonable opportunity was accorded appellants. \* \* \* \* ''

2 The facts in the present case fall squarely within the decision in the Morgan case.

Turning now to the facts in the present case, bearing on the issue of the *procedure* before the Railroad Commission, it appears at once that those facts fall squarely within the decision in the *Morgan* case.

Here, as in the Morgan case, appellant was brought into contest with the Government (the State) in a

quasi-judicial proceeding aimed at the control of appellant's activities.

Here, as there, the Government prosecuted the proceeding. Here, as there, the proceeding had all the elements of contested litigation, with the Government and its counsel on the one side and a pellant and its counsel on the other (R. 203).

In examining the facts to ascertain whether appellant was fairly, or at all, advised of what the Government proposed, what do we find?

(1) Here, as in the Morgan case, the proceeding was initiated by a mere order or notice of inquiry. Copy of the document is attached as Exhibit "B" to the Petition to the Supreme Court of California for Writ of Review (R. 30).

Said document provides, in the most general terms, for an investigation "into the reasonable ness of the rates, charges, contracts, classifications, rules and regulations, or any thereof, now charged or enforced by American Toll Bridge Company in the operation of" the ('arquinet Bridge.

Whether the investigation and the final order would relate to appellant's fares for passenger or for the various types of passenger vehicles of to appellant's rates for freight or to the trucks transporting the same or to appellant's contracts or to its classifications of passengers or commodities, or to its rules and regulations, or to which thereof, appellant had no means of knowing.

Where, among all these matters, the lightning would strike, or what the State's proposals were, appellant, at no time prior to the decision, had any means of knowing.

- (2) Here, as in the Morgan case, no charge or complaint, either formal or informal, was ever fied.
- (3) Here, as in the *Morgan* case, there being no complaint, no answer was or could be filed and no issues were ever defined by any pleadings.
- (4) Here, as in the Morgan case, the State did not make known what it proposed, by any oral argument or by any brief setting forth such proposals.
- (5) Here, as in the *Morgan* case, the State at no time prior to the decision, ever advised appellant of what it proposed to do, by means of proposed findings, or intermediate report.
- (6) Here, as in the Morgan case, by no means whatever, did the State ever advise appellant "of what the Government proposes" or give appellant a fair or any opportunity "to be heard upon its proposals before it issues its final command".

The following language from the Morgan case applies exactly to the present situation (p. 19):

"And the appellants had no further information of the Government's (State's) concrete claims until they were served with the Secretary's (Railroad Commissions) order."

The opinion of the Supreme Court of California contains the following sentence (96 Cal. Dec. 367, 301; R. 140):

"It is not contended that the petitioner was not fairly informed of what the issues were to be or that the issues were not clearly defined and understood by all parties concerned during the course of the hearing."

We submit, very respectfully, that there was and is no justification whatever for that statement.

We here restate what we said on this matter in our Petition for Rehearing before the Supreme Court of California, as follows (R. 193):

"We do not understand how the court could make such a statement. It is absolutely contrary to the facts. Petitioner has contended, meet earnestly, and does now contend that it was not informed, fairly or at all, of what the issues were to be; also that the issues were not defined, clearly or at all; also that there were no issues and hence petitioner did not understand and could not have understood what they were at any time prior to the Railroad Commission's decision.

"The court's statement puts petitioner into an entirely false position. The statement is not warranted by anything which petitioner has at any time said or done.

"We respectfully ask that on rehearing said entire sentence be eliminated from the Decision"

The Railroad Commission had the right, under the rules of the Supreme Court of California, to file at

Answer to said Petition and did so (R. 195), but counsel for the Commission did not dispute the accuracy of the above-quoted language, from our Petition for Rehearing, nor could they have done so fairly.

The Supreme Court of California made no comment on any point raised in our 87 page printed Petition for Rehearing and merely said "The Petition for a rehearing herein is denied",

We again take respectful, but most vigorous exception, to the court's above-quoted sentence.

In leaving this matter, we assume that no State court, by any such unfounded statement, can preclude an appellant from urging, in this Court, the denial of a Federal right.

It will be conceded that the procedure followed by the Railroad Commission in the present case, namely, investigation by the Commission on its own initiative without the filing of any charge or of any complaint and answer, has been used by the Commission in only a relatively few cases. Almost all the formal cases before the Railroad Commission of California are handled by complaint by some third party and answer thereto. The question now before this Court does not relate to those cases, in which issues are defined in the usual way by complaint and answer, but orly to the comparatively rare cases in which the proceedings are initiated by the Railroad Commission itself on its own notion and only to those of such cases in which the Railroad Commission fails to advise the defendant, Prior to the actual decision, of what the Commission's proposals are.

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We believe that the point which we are now presenting is one of the most important issues in the present case. The question is simply this—

"Is there any reason why the principle of the Morgan case, clearly applicable to the proceedings of Federal administrative tribunals, is not equally applicable to the proceedings of State administrative tribunals?"

We submit that the principle is applicable to all administrative tribunals, whether established by the Federal government or by a State government.

We believe it too clear for further argument that the facts of the present case fall-squarely within the decision in the *Morgan* case and that in the light of that decision alone the judgment of the Supreme Court of California should be reversed.

- B. THE PROCEDURE OF THE RAILBOAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION FAILED TO MAKE FINDINGS AS TO FAIL VALUE OR A PROPER RATE BASE AND TO MAKE ANY OF THE OTHER NECESSARY BASIC OR ESSENTIAL FINDINGS
- 1. Duty of administrative tribunal to make basic or essential inings.

It is elementary that it is the duty of an administrative tribunal such as the Railroad Commission of California to make "the basic and essential findings required to support the Commission's order".

In Florida v. United States, 282 U.S. 194, the order under consideration was an order of the Interstale Commerce Commission dealing with rates on loss

moving by railroad between points within the State of Florida. The Commission had made a general finding that the intrastate rates theretofore in effect resulted in "unjust discrimination against interstate commerce", but no findings were made upon the basic and essential facts underlying this ultimate fact. In setting aside the Commission's order because of the failure to make proper findings, this Court, in a decision by Mr. Chief Justice Hughes, said (p. 215):

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (The Beaumont, Sour Lake & Western Railway Company v. United States, 282 U.S. 74) but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the factfinding body and the Court examines the evidence not to make the findings for the Commission but to ascertain whether its findings are properly supported."

In Atchison, Topeka & Santa Fe Railway Co. v. United States, 295 U.S. 193, this Court, speaking through Mr. Justice Butler, said (p. 201):

"But the Commission (Interstate Commerce Commission), in respect of the shipments covered by its order, made no definite finding as to what con-

stitutes complete delivery or where transportation: ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order can not be sustained. Florida v. United States, 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Refining Co. v. Ryan, 293 U.S. 388, 433. See Beaumont, S. L. & W. Ry. v. United States, 282 U. S. 74, 86. Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U.S. 320, 341."

Again, in the very recent case of Saginaw Broadcasting Co. v: Federal Communications Commission, 96 Fed. (2d) 554, decided on March 16, 1938 by the United States Court of Appeals for the District of Columbia, the court said (p. 559):

"The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose where provisions for review are made, of apprising the parties and the reviewing tribunal of the

-factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided according to the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the faces so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

Continuing, the court said (p. 560):

"Our conclusions on this topic are, we think, confirmed by the decisions of the Supreme Court which consider what findings of fact are necessary in reports of the Interstate Commerce Commission. Section 14 of the Interstate Commerce Act, 34 Stat. 589, 49 U. S. C. § 14 (1934), requires only that the report of the Commission shall state its conclusions, unless damages are to be awarded. Nevertheless, the Supreme Court has laid down the rule that, although under this section formal findings of fact are not required, substantial findings of the basic and essential facts necessary to support the order must appear."

It is, of course, well established that this Court master aside an order of an administrative tribunal for lack of findings necessary to support it (Mr. Justi Brandeis, concurring, in St. Joseph Stock Yards (v. United States, 29 'U. S. 38, 74).

# 2. Necessary findings in public utility rate cases.

The subjects on which it is necessary for a Commission, fixing the rates to be charged by a public utilit to make findings of fact, are clearly set forth by the Court in its very recent decision in *United Gas Publi Service Co. v. Texas*, 303 U. S. 123. In its discussion of "procedural due process", this Court, speaking through Mr. Chief Justice Hughes, enumerated sat subjects as follows (pp. 138-9):

Value of the property.

Estimated gross revenue from Commission's rate. Estimated expenses, including allowance for depreciation.

Rate of return.

The Company requested findings on only "material and supplies, working capital, going value and certa other items" (p. 141). This Court pointed out the these items did not include all the items which the just should consider "as for example, the questions operating revenues, operating expenses and return

That the Commission must make findings on sabasic and essential factors is too well settled to justifurther citation of authorities.

3. Railroad Commission failed to make any of the basic or essential findings.

We turn now to the Bailroad Commission's decision to ascertain whether on not the Commission made the "basic or essential findings required to support the Commission's order".

A copy of the Commission's decision is attached to the Petition to the Supreme Court of California for Writ of Review (R. 31).

A review of that decision will show that the Commission failed to make findings as to fair value or any rate base and to make any of the other necessary basic or essential findings.

After narrating certain historical and other preiminary matters, the Commission (R. 37) sets forth certain figures in the evidence (not findings by the Commission) as to "the cost or value of the bridge properties" as contained in various exhibits offered by witnesses of the Commission and the appellant. These figures refer to the Carquinez Bridge alone.

At no point in the decision does the Commission sate which, if any, of said figures it finds to be correct. For does the Commission anywhere state which, if any, of said figures, it adopts as representing the fair whee of the property or as a proper rate base.

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Nowhere in the decision does the Commission set with any number of dollars as being either the fair while of the property or a proper rate base.

There is no finding whatever on this "basic and sential fact".

The only paragraphs in the decision dealing with the actual making of the rate for 1938 are as follows (R. 38):

"In Exhibit 134 the respondent's witness est mated that with the same revision in rate (i. e. 50¢) an induced traffic of 11% might be expected which should produce for the year 1938 from the operation of the Carquinez Bridge a net income, before allowances for federal income and state franchise taxes, of \$629,799. An allowance, for these items, based on the estimated revenue For 1938, would produce a net amount during 1938 available for return of approximately \$575,000. At the closing hearing in this matter, however, this witness modified his estimates and concluded that an increase of 13.5% might be expected which would produce an average annual income of approximately \$14,550 in excess of that appearing in his exhibit, bringing the total estimated net return up to approximately \$590,000.

"A reduction in rates will stimulate the traffer over the bridge, although the extent, of course, cannot be estimated with exactitude. The results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure. When tested upon the bases usually followed by the Commission such a rate of return is reasonable for this particular company, considering the unusual circumstances under which its properties were constructed and have been and are operated. However, for the time being, in order that the company may be assured of financial stability and to guard against possible inaccuracies in the estimate of induced

traffic, by reason of rate reductions, a rate slightly higher than that proposed should be authorized.

"Accordingly, I am of the opinion that a toll of 45¢ per car and of 5¢ for each passenger should be authorized for operations over the Carquinez Bridge. Such a rate should enable the company to meet its requirements under its trust indenture and amortization and dividend requirements."

The first of said three paragraphs narrates evidence contained in appellant's Exhibit 134, in so far as the same relates to the situation which would have resulted if the Railroad Commission had established a 50t toll suggested by one of the witnesses. However, the Commission did not establish that toll and there is nothing in said first paragraph which bears on the effect of the tolls actually established by the Commission. Furthermore, this paragraph merely refers to testimony of one witness and there is nothing whatever in the paragraph in the nature of a finding of fact by the Commission.

Paragraph two says that "the results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure" but there is nothing to show the basis of any estimate and there is no finding here or elsewhere of any figure which represents the "fair value" or even a proper "rate base". Neither the words "fair value" nor "rate base" are even used in the decision. And even as to "investment", the Commission nowhere analyzes the testimony of the various witnesses on that

subject and then sets down a figure which it finds a fact, to be the investment.

And nowhere does the Commission set down a figures to show what gross revenues are estimated it for the year 1938 or any other year from the to established by the Commission, nor what will be to estimated operating expenses, including allowant for depreciation and taxes, nor what will be the amount remaining for return on some undisclos "fair value" or "rate base".

Finally, not a single figure appears from which it Court or any one else can reach a conclusion or evan estimate that the tolls fixed by the Commission will yield in 1938 or at any other time a return of 7.5 on an unascertained "investment" or any other figure.

In paragraph three, the Commission expresses "opinion" that a toll of 45¢ per car and of 5¢ for expassenger "should be authorized" for operations of the Carquinez Bridge but none of the missing based and essential findings appears in support of se "opinion".

In said paragraph, the Commission finally expresses the hope that such rate "should enable to company to meet its requirements under its trust is denture and amortization and dividend requirement but no fact is stated in support of such hope: nor there even a whispered suggestion that such a return would constitute, as a matter of fact, a "fair return the fair value of the property".

Said three paragraphs constitute all there is in the decision as to the actual making of the rate for 1938 or any subsequent year.

## a. No finding as to fair value or rate base.

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We now draw specific attention to the fact that nowhere in said decision does any figure appear which the Commission finds to be the fair value of the property or the proper rate base.

In fact, counsel for the Railroad Commission conceded that such is the case when in brief filed with the Supreme Court of California, they said (R. 167):

"The Commission in its opinion did not make we exact finding of value."

While the Supreme Court of California stated that "the Commission adopted the original cost, namely, \$7,949,954, as the reasonable rate base" (96 Cal. Dec. 367, 377, 378; R. 134), this is merely an "implication" resulting from a "guess" based on the contention of counsel in an effort to show that the Commission may be assumed to have made a finding which it did not, in fact, make. A careful reading of the Commission's decision will show that nowhere did the Commission find, as a fact (as distinguished from a mere recital of evidence) that said or any figure is the "investment" in the property. Even if some figure had been set down by the Commission to constitute, as a fact, the investment, there would still remain the further hurdle of what was the "fair value" or a "proper rate base". The Commission did not even attempt to clear that. hurdle.

In this respect, as well as in others, the case different Railroad Commission of California v. Pacing Gas & Electric Co., 302 U. S. 388. In that case, repling to a contention that the Commission had failed find the fair value of the respondent's property, the Court said (p. 400):

"The Commission specifically found what considered to be the rate base. 39 Cal. R. Comp. 76. The Commission found that rate base to be reasonable. Id. p. 77, note. The import of it opinion is that the rate base represented the Commission's conclusion as to the value which show be placed upon respondent's property for the purpose of fixing rates."

Turning to 39 Cal. R. Com., p. 76, we find that the Commission there said that "the following results at accepted as reasonable". Among these results, the Commission found the following:

"Rate base-\$105,000,000."

There is no such figure in our case. Nor, as we had pointed out, does the Commission even attempt make a finding as to either "fair value" or "rabase" or even once use either of said expressions.

Nor will this Court, by inference or guess support the basic and essential finding which the Railros Commission failed to make.

In Panama Refining Co. v. Ryan, 293 U. S. 35 this Court, speaking through Mr. Chief Justi Hughes, quoted, with approval, from Wichita Ra

T. S. 48, 59, as follows (p. 433):

"It is pressed upon us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this."

Continuing, this Court said (p. 433):

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"Referring to the ruling in the Wichita case, the Court said in Mahler v. Eby, 264 U. S. 32, 44: We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

In United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 294 U. S. 499, this Court found that the Interstate Commerce Commission had failed to make the necessary findings to support an order. Speaking through Mr. Justice Cardozo, this Court said (p. 510):

"In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. Beaumont, S. L. & W. Ry. Co. v. United States, 282 U. S. 74, 86; Florida v. United States, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Likewise, in Atchison, Topeka & Santa Fe Raila Co. v. United States, supra, as we have already point out, this Court held (p. 202):

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"Recently this Court has repelled the suggesti that lack of express finding by an administrati agency may be supplied by implication." (Citi cases.)

b. No finding as to gross revenue, operating and maintenance expensions, depreciation, depletion or any other basic and essential making factor.

Merely to complete the picture, we now invite to Court's attention to the fact that the Commission decision also fails to make any of the following further "basic or essential findings" required to support the Commission's order in a case involving the fixed of the rates or tolls of a public utility:

- 1. While the order purports to establish rate for 1938, there is no finding as to what greenue the rate established by the Commissi will produce in 1938 or in any subsequent years.
- 2. There is no finding as to the reasonal amount of maintenance and operating expensand taxes to be paid in 1938 or in any subseque year;
- 3. There is no finding as to a reasonable a proper allowance for depreciation or deplet in 1938 or in any subsequent year;
- 4. There is no finding as to how many doll will remain in 1938 or in any subsequent year return on the fair value of the property;

5. There is nothing whatever in the decision to show that the rates established by the Commission will yield even a return of 7.5 per cent on the fair value of the property. The entire matter is left to speculation and conjecture and this court is called upon, in the absence of any findings by the Commission, to do the fact-finding work which it was the Commission's duty to do.

At page 380 of its decision (96 Cal. Dec. 367, 380; R. 139), the Supreme Court of California said:

"The petitioner claims that the Commission erred in *computing* the net revenue upon which it estimated the percentage of return."

This statement is erroneous. Appellant is unable to find from the Commission's decision that the Commission rade any computation as to net revenue for 1938 or any subsequent year. To ascertain net revenue, it is necessary (a) to ascertain gross revenue and then (b) to deduct therefrom operating and maintenance expenses, taxes, depreciation and here also depletion. Upon examination of the Commission's decision, the Court will find that it does not contain a finding of fact as to any of these factors for 1938 or any subsequent year at the rates established by the Commission. Without these facts a computation is impossible.

As the Railroad Commission completely failed to make findings on the fair value or any rate base and to make the other necessary basic and essential findings, we submit, very respectfully, that on this ground alone the decision of the Supreme Court of California should be reversed.

- C. THE PROCEDURE OF THE BAILBOAD COMMISSION CONTUTED A DENIAL OF DUE PROCESS OF LAW BECKTHE COMMISSION FAILED TO FOLLOW THE RATEMAN RULE OR STANDARD PRESCRIBED BY THE LEGISLATION CONTURBED OF CALIFORNIA FOR APPLICATION TO TOLL BRIDGE PANIES.
- Sections 2845 and 2846, Political Code, have never been reper If their language is the language of regulation as distinguage from the language of contract, said Sections contain the rateing rule or standard which is at this time applicable to tell be companies.

As we have hereinbefore pointed out, we are vinced that the language of Sections 2845 and 284 the Political Code is the language of contract and the language of regulation. If this is so, that ends appeal in our favor.

On the other hand, if said language be held to the language of regulation, establishing a rate-marule or standard which the Legislature can chang any time, we come to the question whether or not Legislature has actually changed that rule or stard, in so far as toll bridge companies are concernated in the Legislature conferred on the Railroad Companies regardless of the provisions of said tions 2845 and 2846?

Here we are squarely confronted with the quest as to what the Legislature actually did in 1937.

It will be conceded that, prior to the effective of the Act of July 1, 1937 (St. 1937, ch. 896, p. 24 see also Appendix No. 2), the Railroad Committee

had no jurisdiction whatever over toll bridge corporations. It will likewise be conceded that there is no other statute undertaking to confer any such authority upon the Rancoad Commission.

What did the Legislature actually do in 1937?

The Legislature, in said Act (p. 2478), merely amended Section 2 (dd) of the Public Utilities Act so as to provide that the term "public utility", when used in the Act, should include every "toll bridge corporation" and added to said Section 2 a new subsection numbered (ee) defining the term "toll-bridge corporation" as used in the Act.

That is all. The Legislature did nothing more. It merely defined toll bridge corporations and provided that they should be classed as public utilities.

Turning now to what the Legislature did not do, we find the situation to be as follows:

(1) The Legislature did not repeal or amend Section 2845 or Section 2846 of the Political Code. The stuation with reference to the fixing of the rates charged by toll bridge corporations was left just where the Legislature found it, except that the Railmold Commission was substituted for the boards of supervisors as the rate-making authority in connection with toll bridge corporations. In stepping into the shoes of boards of supervisors in that respect, the Railroad Commission, of course, took its new responsibility subject to the existing limitations unless it could be shown, which is not the fact, that those limitations had been repealed.

'It is true that Section 13 (a) of the Public Util Act provides that all charges made by any pu utility "shall be just and reasonable" (St. 1915, 91, pp. 115, 122). However, this is a provision of general character applicable to public utilities general. On the other hand, said Sections 2845; 2846 contain specific provisions applicable to specific classes of public utilities only, namely, bridges and public ferries. That the specific toll p visions of said Sections 2845 and 2846 applicable of to toll bridges and public ferries must prevail of the general provisions of Section 13(a) of the Pul Utilities Act relating to public utilities in general would seem to be elementary. As to toll bridges public ferries, the Legislature set up in said Section 2845 and 2846 a definite standard of just and reas able tolls and that standard must prevail, as long a is unrepealed, over the general standard of just and reasonableness referred to in said Section 13 of the Public Utilities Act.

The failure of the Legislature to amend or resaid Sections 2845 and 2846 of the Political C when it merely declared, in 1937, that toll bridge porations should be public utilities, shows a clear tention that the Railroad Commission, in steppinto the shoes of the boards of supervisors as to bridge corporations, must follow the standard as just and reasonable rates established as to toll bricorporations and ferries by said Sections 2845 and must comply with the unrepealed rate-uping limitations in said Sections 2845 and 2846, even

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these limitations be regarded as words of regulation as distinguished from words of contract.

(2) It is important to bear in mind that the Legislature had consistently shown that the preservation of rights under toll bridge franchises was a matter of concern to it.

As we have hereinbefore shown, the Legislature in 1923 amended Section 2872 of the Political Code so as to ratify expressly all franchises granted subsequent to March 14, 1881, for the construction of toll bridges across straits, streams or creeks within the territory in which the Carquinez and Antioch Bridges are located (St. 1923, ch. 131, p. 272).

Also, when in 1929 the Legislature passed the Act of June 10, 1929, granting to the Department of Public Works the exclusive jurisdiction thereafter to grant franchises for the construction of toll bridges and toll roads, the Legislature was careful to provide that the statute should not apply to any persons or corporations holding existing toll bridge franchises (St. 1929, th. 764, p. 1502, sec. 8).

When, on the same day, the Legislature enacted another statute repealing the Act of March 14, 1881, providing for the construction of toll bridges across mavigable streams, it expressly provided that all rights then existing under any valid franchise there-tofore granted under the repealed Act, should "continue in full force and effect" (St. 1929, ch. 765, p. 1504, sec. 2).

Also, when in 1933 the Legislature further ferred upon the Department of Public Works a j diction as to toll ferries similar to that conferm 1929 as to toll bridges, the Legislature was againful to provide that the Act should not be constructed apply to any persons or corporations holding the chises for or operating either toll bridges or toll ries (St. 1933, ch. 7, p. 13, sec. 7).

If it had been the intention of the Legislatur 1937 to change its theretofore consistent policy protecting the rights of the holders of toll by franchises, it may be assumed that the Legisla would have expressly declared that intention. Su declaration would appear to have been all the necessary in view of the Legislature's consistent policy throughout the preceding seventy-five year protecting the rights of the grantees of toll by franchises.

(3) In California, toll bridge regulations always been in a class by themselves.

As the Supreme Court of California said in l. som v. Board of Supervisors of Contra Costa Co. 205 Cal. 262, 266:

"In other words, toll-bridge regulations been from the early history of the state and are in a class by themselves."

As we have shown, the Legislature in 1937 left regulations where it found them "in a class by the selves", merely putting the Railroad Commission the shoes of the boards of supervisors as the making agency.

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t If the language of said Sections 2845 and 2846 is the language of regulation, it was the duty of the Railroad Commission to apply the presently effective rate-making rule of said Sections to the talk of the Carquinez Bridge.

irrespective of what the Legislature might have done, it seems clear that it did not, in fact, give the Railroad Commission authority to disregard the rate limitations contained in Sections 2845 and 2846 of the Political Code, even if said limitations be regarded as being solely regulatory in character and hence subject to amendment or repeal by the Legislature at any time regardless of the effect on holders of toll bridge franchises.

We are satisfied that the rate limitation provisions of Sections 2845 and 2846 of the Political Code on which we rely are contractual in character. We believe that the legislative history as well as the language itself-and the reason of the thing lead inevitably to this conclusion. However, out of an excess of mution and not because we believe such to be the fact, we have given consideration to the matter on the assumption that said provisions are regulatory in character and can be changed, at will, by the Legislature.

However, on this latter assumption, we have shown that, irrespective of what the Legislature might have done in 1937, it did not, in fact, confer upon the Railmol Commission the right to disregard said provisions. In the exercise of its rate-making power over toll bridge corporations, standing in the shoes of the Board of Supervisors of the County of Contra Costa, the Railroad Commission is bound by the unrepealed

provisions of Sections 2845 and 2846 of the Political Code, both if such provisions are regarded as pure regulatory and if they be regarded, as we claim a contractual in character.

In either event, we very respectfully submit the Railroad Commission could not, as it attempted to do, lawfully, fix the tolls of American Toll Bridge Company in disregard of said provisions.

3. Failure of the Railroad Commission to apply the rate-main rule of Sections 2845 and 2846 of the Political Code to the tall of the Carquinez Bridge constituted a denial of procedural in process of law.

The failure of an administrative tribunal charge with the duty of regulating rates of a public utility to follow the rule of rate-making established for the purpose by the Legislature is clearly a denial of procedural due process of law.

The utility has the right to have such rule applied Failure to do so is obviously a denial of the rights of the utility under Section 1 of Article XIV of the Amendments to the Constitution of the United States

a. Where the Legislature has prescribed a rule or standard of making, it is the duty of the rate-making authority to followed rule or standard.

In St. Louis & O'Fallon Railway Company v. Unite States, 279 U. S. 461, the plaintiff railway companie brought suit to set aside an order of the Interstat Commerce Commission directing that certain payment be made under the recapture provisions of the Trans portation Act of 1920. This Court held that the Comrason that the Commission failed to follow the standard set by Congress to be used by the Commission in determining fair value.

This Court, speaking through Mr. Justice Mc-Repolds, held that such legislative standards must be followed by administrative tribunals and, in this conmetion, said (p. 487):

"But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed."

"It was deemed unnecessary by the court below to determine whether the Commission obeyed the statutory direction touching valuations, since the order permitted The O'Fallon to retain an income great enough to negative any suggestion of actual confiscation. With this we cannot agree. Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid."

In Louisville and Nashville Railroad Company v. forrett, 231 U. S. 298, suit was brought by the Railmod Company to enjoin the enforcement of a rate order and a reparation order made by the Railroad Commission of Kentucky.

Referring to the questions to be considered by the burts in such rate-making cases, this Court, speaking wough Mr. Justice Hughes, said that the first question to be considered would be "whether the Commis-

sion acted within the authority duly conferred by the legislature' (p. 313).

In Wichita Railroad & Light Company v. Public Utilities Commission of Kansas, 260 U. S. 48, the Light Company filed a bill for an injunction to enjoy the Public Utilities Commission of Kansas from making effective certain rates for electric energy. The Court held that the Commission's order was void of its face.

At page 58, the Court, speaking through Mr. Chie Justice Taft, said:

"The maxim that a legislature may not delegate legislative power has some qualifications, as it the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulator, police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature to prevent its being a pure delegation of legislative power, must enjoin upon it a certain cours of procedure and certain rules of decision in the performance of its function."

Continuing, the Conf aid (p. 59):

"It is a wholesome and necessary princip" such an agency must pursue the procedure rules enjoined and show a substantial compliant therewith to give validity to its action."

In Mahler v. Eby, 264 U.S. 32, certain persons who had been seized on deportation warrants of the Serre

tay of Labor sued out writs of habeas corpus. This fourt held that the warrants were defective for the mason that the Secretary had failed to make a finding that the petitioners were "undesirable citizens", as required by the statute.

At page 44, referring to Wichita R. R. & Light Co. r. Public Utilities Commission, 260 U. S. 48, the Court and:

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

In Panama Refining Co. v. Ryan, 293 U.S. 388, this fourt, at pages 432-3, quoted, with approval, from with Wichita Railroad & Light Co. v. Public Utilities Commission, supra, and Mahler v. Eby, supra.

I falure of the rate-making authority to follow the legislative rule or standard of rate-making is arbitrary action which constitutes denial of procedural due process of law.

Where a public utilities commission, exercising the enslative function of rate-making, disregards the standard which the Legislature has established for much rate-fixing, it would seem too clear for argument that the commission has acted arbitrarily and, consequently, has denied to the utility due process of law. In the following cases, among others, this Court held that when the rate-making tribunal acts arbitrarily, much action constitutes denial of procedural due

process of law "and comes under the Constitution's condemnation of all arbitrary exercise of power".

Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U. S. 88, 91;

Northern Pacific Railway Company v. Department of Public Works of the State of Washington, 268 U.S. 39, 44-5;

Chicago, Milwaukee & St. Paul Railway Company v. Public Utilities Commission of the State of Idaho, 274 U.S. 344, 352.

In Panama Refining Co. v. Ryan, 293 U. S. 388, the general rule that an administrative board or commission must act within the delegated authority and that if it does not do so its action constitutes denial of due process of law is thus stated by the Court, speaking through Mr. Chief Justice Hughes (p. 432):

"If the citizen is to be punished for the erime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission \* \* \* \*

Applying the general rule to the specific facts of a rate order made by a State public service commission, this Court, in West v. Chesapeake & Potomo Telephone Company of Baltimore, 295 U. S. 662 speaking through Mr. Justice Roberts, said (p. 679)

"We have shown that the Commission's order violates the principle of due process, as the near ure of value adopted is inadmissible."

As the rate-making rule or standard specified by Sections 2845 and 2846 of the Political Code of California for application to toll bridge companies has been repealed and was fully effective at the time-when the Railroad Commission made the order moder review herein, and as the Commission failed and refused to apply said standard or rule, we submit, very respectfully, that said action by the Railmad Commission constituted a denial of procedural the process of law and that, for this reason alone, the judgment of the Supreme Court of California should be reversed, even if it be held that the language of said Sections 2845 and 2846 of the Political Code is the language of regulation and not the language of contract.

LECTURION OF ANTIOCH BRIDGE. THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION UN-MIRLY, UNJUSTLY AND ARBITRARILY SEVERED THE ANTIOCH BRIDGE FROM APPELLANT'S SINGLE, UNIFVED TRANSPORTATION SYSTEM AND FIXED TOLLS FOR THE CARQUINEZ BRIDGE ALONE, NOTWITHSTANDING PACT THAT THE RECORD SHOWS, WITHOUT DISPUTE, THAT THE INEVITABLE EFFECT OF THE REDUCTION OF TOLLS ON THE CARQUINEZ BRIDGE WOULD, BY FORCE OF COMPETITION BETWEEN THE TWO BRIDGES, COMPEL APPELLANT TO MAKE SIMILAR REDUCTIONS IN THE THE CHARGED ON THE ANTIOCH BRIDGE, A LOSING VENTURE. THUS ACCOMPLISHING BY INDIRECTION A RE-SULT WHICH THE RAILROAD COMMISSION COULD NOT ACCOMPLISH DIRECTLY.

The result has been that the Commission cut the arquinez Bridge tolls deeper than it could otherwise

have done, if at all, relying on the force of competition to pull the tolls of the Antioch Bridge down to those thus fixed for the Carquinez Bridge. That such action denied to appellant "the rudimentary requirements of fair play" (Morgan v. U. S., 304 U. S., 15) seems very clear.

. We shall now develop the facts and then consider the authorities.

# 1. Company's motion and Commission's decision.

On August 27, 1937, the Railroad Commission, on its own motion, in Case No. 4244, instituted an investigation into the rates, rules and regulations of American Toll Bridge Company, San Francisco Bay Toll Bridge Company and Dumbarton Bridge Co., owning and operating toll bridges across the waters of San Francisco Bay (R. 27).

The order specifically mentioned both the Corquinez and the Antioch Bridges of American Toll Bridge Company.

Thereafter, on October 4, 1937, after the Commission's experts had been examining the Company's books for approximately a month and, presumably, had ascertained the financial situation of the Company with reference to both the Carquinez and the Antioch Bridges, the Commission, in Case No. 425% instituted another investigation into the rates charges, contracts, classifications, rules and regulations of American Toll Bridge Company alone and confined to the operation of the Carquinez Bridge (R. 30).

It was in the latter case that the decision and order review were made.

The initial hearing in both cases was held on Octoer 26, 1937. At that time, counsel for American Toll bridge Company made a formal motion to consolidate ases 4244 and 4259 for hearing and decision, in so ar as American Toll Bridge Company is concerned, that the Commission would make its ruling on the lites, rules and regulations to be charged for transortation over both the Carquinez and the Antioch bridges (R. 204-6).

In support of his motion, counsel pointed out that the Carquinez and the Antioch Bridges are component arts of the single transportation system of American Toll Bridge Company; that in so far as their materials traffic is concerned the bridges are distinctly empetitive; that the operations of the Antioch ridge have been less satisfactory, financially, than lose of the Carquinez Bridge; that the competition tween the two bridges is such that the inevitable related would be to force like reduced rates for the stock Bridge; and that a consideration of the rates the Carquinez Bridge alone would work a great justice on American Toll Bridge Company and the vice which it renders (R. 204-6).

The Commission did not then rule on the motion took the same under advisement (R. 207).

The Commission proceeded in Case No. 4259 alone. failure to proceed in Case No. 4244 was empha-

Exhibit 1 from Case No. 4244 to Case No. 4259 (R. 208).

In its decision, the Commission, without giving any reason for its action, denied said motion. The Commission merely said that "it has been decided" to limit its decision and order to the Carquinez Bridge (R. 33-34).

The decision shows on its face that in determining the tolls to be charged for the transportation of automobiles and passengers over the Carquinez Bridge the Commission confined its consideration to that bridge alone. The figures referred to in connection with the new tolls relate to the Carquinez Bridge alone (R. 36-38).

The tolls fixed by the Commission are made specifically applicable to the Carquinez Bridge alone (R. 38).

While the decision states (R. 34) that in fixing rates for traffic over the Carquinez Bridge, consideration would be given to the effect of such rates on the Company as a whole, this statement is obviously a inadvertence. The decision contains no figure as a fair value or rate base, or revenues or expenses a return as to the Antioch Bridge and says nothing a to the tolls charged or to be charged on the Antioch Bridge. The Antioch Bridge is purposely exclude from consideration.

The Carquinez and the Antioch Bridges are component parts of the ragle, unified transportation system of American Toll Bridge Company.

The record herein shows, without any evidence to be contrary, that the Carquinez and the Antioch bridges are component parts of the single, unified company.

At page 375 of its decision, the Supreme Court of alfornia said (96 Cal. Dec. 367, 375; R. 131):

"The fact that the bridges are competitive, together with a consideration of all the other relevant facts appearing, may be said to have justified the commission in concluding that they are not integrated into a single transportation system and that neither is used or useful in any service performed by the other."

It is respectfully submitted that this statement is early surmise on the part of the court. The simple not is that the Commission made no finding on the object. The Commission merely said that "it has sen decided to limit this decision and the order rein to Case No. 4259", without any discussion and thout giving any reason for the conclusion thus ached (R. 33).

The evidence, without any dispute whatever, negaes the court's surmise.

The franchises for both bridges were granted by linances of the Board of Supervisors of Contrasta County to the same financial interests in the stable of 1923. Both franchises are for terms of

twenty-five years and each will expire in the first half of 1948 (R. 209, 226-7).

During all the time that construction work was proceeding on the Antioch Bridge, construction work was also going on on the Carquinez Bridge (R. 339). The Supreme Court of California was in error in stating that appellant "purchased" both bridges to reduce competition or at all (96 Cal. Dec. 367, 375; R. 131). The simple fact is that appellant, as owner of both franchises itself constructed both bridges as a single venture.

American Toll Bridge Company operates both toll bridges "as one property" (Mitchell, Exh. 3, R. 29, 231).

American Toll Bridge Company has a single set of books for both bridges. No separate set of books is kept for the Carquinez Bridge as distinguished from the Antioch Bridge (Coleman, R. 338).

Numerous single items of assets and liabilities are applicable to both the Carquinez and the Antich Bridges. Typical of these items are the Company's capital stock and its bonds. These items were issued against both bridges (Coleman, R. 339); see also Statement of Company's Assets and Liabilities Exh. 1 (R. 209, 212-213, Coleman). In order to determine assets and liabilities properly to be charged against the bridges separately, it would be necessary to make apportionments on more or less arbitrary bases (Coleman, R. 339).

The two bridges are located within twenty-five miles of one another across the same water barrier. Although they are, in certain respects, supplementary to one another, they are, as to the major traffic, distinctly competitive. For a map showing the location of said two bridges, please see frontispiece to this brief; also R. 264A.

In the "Report on Investigation of Carquinez Toll Bridge" dated October 20, 1932, which report State Highway Engineer C. H. Purcell submitted to Earl Lee Kelly, Director of Public Works, and he, in turn, to the Governor of California, advice was given, on page 8, as follows (Mitchell, R. 290):

"Attention is again called to the fact that the American Toll Bridge Company owns and operates as one project, both the Carquinez and Antioch toll bridges, and it is, therefore, necessary to consider the future earning power of the two bridges in order to arrive at a reasonable price for which the stockholders of that Company could dispose of the Carquinez Bridge alone."

The Report, at page 37, said (Mitchell, R. 290-1):

"It must be recognized that those who initiated and developed a project such as these toll bridges are entitled to be rewarded for their foresight and for the risk which they had taken. The public, having held off until the results are more or less assured, must expect to pay for the pioneering of others."

The Report then, at page 38, first estimates the stal fair purchase value of both bridges, being the

sum of \$11,032,140.00 and then, by making cert deductions from the combined value of both brid determines a fair net purchase price of the Carqui Bridge alone, being the sum of \$10,288,84 (Mitchell, R. 291-2).

The significant point is that the officials of the St Highway Division and of the Department of Pu Works of the State of California clearly recognithat the two bridges are part and parcel of a sinunified project. Hence, in order to ascertain a net purchase price of the Carquinez Bridge alone to found it necessary and proper to determine first fair purchase price for both bridges together.

The record compels the conclusion that the two bridges are component parts of appellant's su unified transportation system.

3. The Carquinez and the Antioch Bridges are competitive with another and charge the same rates. Hence a reduction in the charged by one of these bridges necessarily forces a similal duction in the tolls charged by the other bridge.

As the Antioch Bridge serves substantially same territory and the same traffic as the Carque Bridge and is distinctly competitive with it, the evitable effect of the Commission's decision, is stands, would be to force the Company to reduce Antioch Bridge tolls to the same level as the quinez Bridge tolls, and thus to still further we the financial condition of the Company.

The record shows, without any dispute, that Antioch Bridge operated in the red in the years 1927, 1928, 1933, 1934, 1935 and 1937 (Coleman, R 341).

The statement in the decision of the Supreme Court of California (96 Cal. Dec. 367, 376; R. 132-3) that

"the petitioner is not entitled to have the investment and operating expense of both bridges included in the rate base upon which to compute a toll for the Carquinez bridge,"

is a misstatement of this appellant's position. We have never taken such a position. What we have urged and believe to be the only fair thing to do, is that the fair value, revenues and expenses of both bridges be considered together for the purpose of fixing volls for both bridges, not for the Carquinez Bridge alone.

Unless appellant is correct in its position as to the impairment of contract obligations, the fair and lawful thing to have done would have been for the Commission to have considered the entire transportation properties of appellant, consisting of both bridges, and to have established rates which would have yielded a fair return on the fair value of the entire property of the appellant devoted to the service of transportation.

The Commission's exclusion of the Antioch Bridge was unfair, unjust and arbitrary and constituted a denial of procedural due process of law.

As we have already shown, an order of an administrative tribunal which is unjust, unreasonable and arbitrary constitutes denial of procedural due process of law, even though the order is in form within the limits of the delegated p wer.

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547; State of Washington ex rel. Oregon Railroad and Navigation Company v. Fairchild, 224 U. S. 510, 524;

Great Northern Railway Company v. State of Minnesota, 238 U. S. 340, 345;

Northern Pacific Railway Company v. Department of Public Works of the State of Washington, 268 U. S. 39, 45.

In Coney v. Broad River Power Co., 171 So. Car. 377, 172 S. E. 437, the Supreme Court of South Carolina held void an order of the Railroad Commission of South Carolina fixing rates to be charged by Broad River Power Co. for electric energy. The reason for the decision was the exclusion by the Commission from the rate base and from the operating revenues and expenses of the figures relating to the Company's street railway system in the City of Columbia and its environs.

The evidence showed that the operations of the Company's street railway system were much less profitable, financially, than those of its electric system. It was obvious that the Railroad Commission excluded the street railway system so as to be able to fix lower rates for electric energy than would be the case if consideration were given to the Company's entire property, including both its street railway and its electric systems.

In this respect, the case bears a striking analogy to that now before this Court.

The Supreme Court of South Carolina, after reviewing decisions of this Court, found that the Railroad Commission had been in error in excluding said street railway property. On this point, the court said (p. 441):

"The court finds that it was error to exclude the value of the property and franchise of the Columbia Street Railway, Gas & Electric Company from the base value of the company's properties \* \* \*"

Replying to the argument that the Railroad Commission had "discretion" in fixing the unit for the rate base, the court said (p. 440):

"Considering, if you please, that the commission has large discretionary power in fixing rates under the authority given it by the act of the General Assembly, nevertheless its discretion is not an arbitrary one, but is a legal one to be exercised in accordance with the facts in the case as shown by the evidence."

The proposition that less than the entire property of a public utility is frequently fixed as the appropriate unit for rate making purposes, is too firmly established to justify the citation of authority. Thus, it would be ridiculous to say that in fixing the rate to be charged for electric energy in a small community by a far-flung electric company it would be neces-

sary to ascertain the value of the company's entire system property.

The determination of the proper rate-making unit is a matter which necessarily rests, in the first instance, in the exercise of a proper discretion by the rate-making authority. But, as was said in the Coney case, that

"discretion is not an arbitrary one, but is a legalone to be exercised in accordance with the facts in the case as shown by the evidence."

However, the fact that in many instances rates are fixed for only a portion of a public utility's system is in our opinion, no justification whatever for excluding from consideration a portion of the transportation system which is parallel with and almost adjacent to the portion for which rates are to be fixed and which, by reason of the *competitive* situation will be immediately, directly and seriously affected by the rates established for the neighboring portion of the same transportation system.

In such a case, "the rudimentary requirements of fair play" as well as proper rate making principles, require that the problem be considered as a whole.

In ruling against appellant herein on the issue of the exclusion of the Antioch Bridge, the Supreme Court of California (96 Cal. Dec. 367, 375-6; R. 132) cited Wabash Valley Electric Co. v. Young, 287 U. S. 488, Gilchrist v. Interborough Rapid Transit Company, 279 U. S. 159 and International Railway Co.

v. Prendergast, 1 Fed. Supp. 623, but none of these cases support the court's conclusion.

In Wabash Valley Electric Co. v. Young, 287 U. S. 488, citizens of the City of Martinsville and the City itself joined in an application to the Public Service Commission of Indiana asking that existing rates for electric energy be reduced. The Commission thereafter made its order reducing said rates. The principal issue before this Court was whether or not the electric utility's entire operating property, covering thirteen counties and fifty cities and towns in Indiana, should have been taken as the unit in fixing the rate base (pp. 493, 495).

The evidence showed that the electric system in the City of Martinsville was originally built and operated as a separate and complete plant to serve that City alone; that it later became part of the larger production and transmission system of Wabash Valley Electric Co.; that the electric utility had filed with the Indiana Commission a schedule of rates applicable to the City of Martinsville alone; that prior to the acquisition of the property by Wabash Valley Electric Co. it had always been a distinct and separate unit for the purpose of fixing rates; and that the Indiana statutes required that the municipality be treated as a separate unit (pp. 493-7).

Furthermore, this is a case in which there was no competitive feature whatever between separate portions of a single unified public utility system. There was no competition between the electric system in

Martinsville and the electric system in any adjacent city or other territory.

Thus, the facts of that case are entirely different from the facts of the present case. The Wabash Valley Electric Co. case is a good illustration of a case involving the very factors which do not exist in the present case.

In Gilchrist v. Interborough Rapid Transit Company, 279 U. S. 159, the question at issue was whether or not the Transit Commission of the City of New York had jurisdiction to authorize an increase of the existing street car fares in the City of New York from 5¢ to 7¢. On the question whether the elevated and the subway operations could be treated separately or whether they should be considered as a single rate making unit, an affidavit filed by the City of New York contained, among others, the following allegations (p. 200):

"The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation."

Furthermore, it appeared that Interborough Rapid Transit Company had itself treated the two systems as being distinct and separate for rate making purposes when, on May 28, 1920, it filed an application with the Transit Commission for authority to charge a higher fare than 5¢ on the subways alone, without asking any relief at that time as to the elevated lines (p. 206).

On that state of facts, this Court, speaking through Mr. Justice McReynolds, properly pointed out that "the two systems have been treated as separate and upon this record must be so regarded" (pp. 209-10).

However, in the case now before this Court, the Carquinez and the Antioch Bridges have always been operated as a single property under a single financial set-up, the tolls have always been the same on both bridges and both bridges have uniformly been treated by the Company as a unit in respect to tolls.

In International Railway Co. v. Prendergast, 1 Fed. Suppl. 623, the question at issue was whether or not the street railway fares in the City of Buffalo were confiscatory. The Company urged that the Public Service Commission should have included in the rate base street railway systems in other cities and two international bridges across Niagara Falls. The court very properly pointed out that with the acquiescence of the Company the Public Service Commission had theretofore treated the Buffalo street railway portion of the system as a separate unit of operation. Quite naturally, the Company's position was held to be untenable.

The case is, of course, quite different on its facts from that now before this Court. There was no showing of any competitive situation between the street railway system in Buffalo and the Company's other properties. Nor did the street railway properties in the other cities or the two international bridges serve the same territory or any part thereof as the street rail-

way system in the City of Buffalo. The International Railway Co. case was not a case in which the reduction of the rates of a public utility on one part of its system would have the inevitable effect, by reason of the play of competitive forces, of compelling the public utility to make a similar reduction in the rates on a parallel portion of a single, unified transportation system.

On the other hand, Clarksburg-Columbus Short Route Bridge Co. v. Woodring and Parkersburg-Community Bridge Company, 89 Fed. (2d) 788, decided on Feb. 1, 1937, presented the situation of two competitive toll bridges each crossing the Ohio River. The one, owned by the Parkersburg Company, was located between Parkersburg, West Virginia, and Belpre, Ohio. The other, owned by the Clarksburg Company, was located between St. Mary's, West Virginia, and Newport, Ohio. The distance between the bridges was twenty miles. These two bridges were competitive and their toll rates were approximately the same (p. 789), just as is the case with the Carquinez and the Antioch Bridges. Both bridges were subject to the authority of the Secretary of War to prescribe their toll rates (p. 790).

The Secretary of War reduced the toll rates to be charged by the Parkersburg Company, without giving notice to the Clarksburg Company or considering any of the facts relating to that Company. The Clarksburg Company filed its bill for injunction against the Secretary and the Parkersburg Company. The District

Court granted the Secretary's motion to dismiss. The decree was reversed by the United States Court of Appeals for the District of Columbia in an opinion by Associate Justice Van Orsdel

At page 791, the court said:

"In the present situation, considering the sharp competitive conditions existing between the two companies here involved, it was impossible for the Secretary to arrive at a decision fixing 'just and reasonable' tolls in the absence of complete and full testimony as to all the conditions bearing upon the rights of these respective parties. As suggested, the procedure is judicial and all the attributes of a judicial proceeding should be observed in order to arrive at a just and equitable conclusion."

In conclusion, the court said (p. 794):

"We think the lower court was in error in holding that the Secretary was not required to consider the effect of the new rates 'upon another bridge 20 miles distant'. This loses sight of the fact that these two bridges are integral parts of a single transcontinental highway, the branches thereof dividing east of the bridges and converging again west of the bridges, thus dividing the traffic, as the public may find convenient, between the two bridges in question. It is difficut to imagine a case where a rate reduction on one instrumentality of commerce more directly affects another than in the case here presented.

"The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

This Court subsequently held that the cause had become moot (Woodring v. Clarksburg-Columbus Short Route Bridge Company, 302 U. S. 658), but no criticism was made of Justice Van Orsdel's reasoning.

That reasoning is, we submit, all the more applicable where the two competitive toll bridges are owned by one and the same company. In such a case, we believe it most unfair and arbitrary for the rate-fixing tribunal to consider only the situation of the more profitable of the two competitive bridges and thus to fix a rate lower than could possibly be done if the rate-making facts as to both bridges were considered and a toll established for both bridges.

We respectfully submit that the Railroad Commission could not properly justify the exclusion of the Antioch Bridge by reliance on any "discretion" but that it should have proceeded with its original investigation, in so far as American Toll Bridge Company is concerned, and should have fixed the tolls to be charged by both the Carquinez and the Antioch Bridges and that its action in fixing tolls for the Carquinez Bridge alone, exclusive of the Antioch Bridge, was unjust, unreasonable and arbitrary and constituted a denial to appellant herein of procedural due process of law.

# E. CONCLUSION ON DENIAL OF PROCEDURAL DUE PROCESS.

If the Court finds it necessary in this appeal to look beyond the question of impairment of contract obligations, and turns next to the questions under the head of "procedural due process", we believe that the Sens the conflict of the confl

Court will find that for each of the reasons specified under subheads A, B, C and D hereof the procedure of the Railroad Commission constituted a denial of procedural due process of law.

And we respectfully submit that if said specifications are viewed together, as a whole, the conclusion is inescapable that the procedure of the Railroad Commission deprived appellant of procedural due process of law in violation of the provisions of Section 1 of Article XIV to the Amendments of the Constitution of the United States.

#### III.

#### DUE PROCESS-CONFISCATION.

- A THE BAILBOAD COMMISSION'S ORDER CONFISCATED AP-PELLANT'S PROPERTY IN THE CARQUINEZ BRIDGE BF CAUSE IT FAILED TO ACCORD A FAIR BETURN ON FAIR VALUE.
- 1. Rate base.
- a. Book cost.

The book cost of the physical items of the property, together with overheads, as recorded on the Company's records, was shown to have been \$7,949,954.02 (Exh. 117—Ready and Gerwick—R. 410, 411, col. 1).

This figure can also be deduced from Exhibit 1, presented by Mr. Coleman of the Railroad Commission's staff. Mr. Coleman reported that the cost of the physical items, together with overheads, as recorded on the Company's books, was \$7,863,451.17 (R. 209, 214). However, this sum does not include the cost

of lands or of furniture and fixtures, which items are shown in Exhibit 117, Gerwick and Ready, to have been as follows (R. 410, 411).

Lands	\$66,834.62
Furniture and fixtures	\$19,668.23

The addition of these omitted items to Mr. Coleman's said figure of \$7,863,451.17 gives said total book cost of \$7,949,954.02.

Accordingly, it appears that there is no dispute in the record as to the original cost, as recorded on the books, of the physical items which entered into the construction of the Carquinez Bridge, plus the applicable overheads.

However, as will appear, said figure contains only a partial allowance for proper interest during construction and also contains no allowance for the cost of developing the business, or going concern value.

#### b. Reasonable historical cost.

Mr. Ready and Mr. Gerwick reported that the reasonable historical cost of the physical items of the property, including overheads, but not including any allowance for cost of developing the business, would have been \$8,139,307.84 (Exh. 117, R. 410, 411, col. 3). There was practically no cross-examination as to this figure and it may be accepted as a correct estimate.

## c. Reproduction cost new-1937.

Exh. 118 is an estimate by Mr. Ready and Mr. Gerwick of the cost to reproduce new, as of 1937, the

physical items of the Carquinez Bridge, together with the necessary overheads. The total estimate is \$8,743,-231.14 (R. 415, 416).

None of the above figures contain any allowance for the cost of developing the business, or going concern value, to which item more specific reference will hereinafter be made.

Mr. Stewart Mitchell, testifying for the Railroad Commission, first submitted in Exhibit 3 (R. 229, 245) an estimate of what it should reasonably have cost to construct the physical items of the Carquinez Bridge, together with overheads, the total sum being \$6,186,-071.00. The witness later raised this sum to \$6,877,-318.00 (Exh. 16, R. 247, 257, col. 2). The testimony of this witness was so thoroughly discredited by his lack of training and experience, by innumerable omissions of important items, by underestimates of costs, and by hypothetical and impossible assumptions underlying his estimates (Mitchell, cross-examination, R. 293-334; Derleth, R. 366, 368-9, 371-7, 379-80, 382-4, 386, 388, 390, 392-401; Coleman, R. 336-8; McAllister, R. 447-9), that his estimates will not be further herein referred to except in connection with certain specific items. It is significant that there is nothing in the Railroad Commission's decision to indicate that the Commission gave any consideration to the estimates of this witness.

## d. Value of investment-1929.

In report entitled "Investigation and Report on Toll Bridges in the State of California", prepared by the California Highway Commission for the members of the State Legislature and dated January 23, 1929, the Highway Commission reported, page 67, that the value of the investment in the Carquinez Bridge at that time was \$10,676,142.00 (Mitchell, R. 288).

### e. Fair purchase price-1932.

In "Report on Investigation of Carquinez Toll Bridge" submitted by Mr. C. H. Purcell, State Highway Engineer, to Mr. Earl Lee Kelly, Director of Public Works, on October 21, 1932, and on the same date by Mr. Kelly to Governor Rolph, the State Highway Engineer and the Director of Public Works reported (p. 38) that a net fair purchase price of the Carquinez Bridge at that time would be \$10,288,840.00 (Mitchell, R. 292).

# f. Railroad Commission's failure to make any finding as to fair value or rate base.

As we have already shown, the Railroad Commission failed to make any finding as to any number of dollars as being either the fair value of the Carquinez Bridge or a proper rate base.

This failure makes it very difficult for either court or counsel to proceed to determine whether or not the rates fixed by the Commission will confiscate appellant's property in the Carquinez Bridge. This is a task which, by reason of the Commission's said failure, is most difficult for counsel and which the Court should not be called upon to perform at all.

and the same

Under the circumstances, we have decided to develop a minimum rate base by taking the lowest reliable figure in the record and merely making two necessary additions thereto. This lowest figure is the agreed book cost of \$7,949,954.00, which figure contains only a partial allowance for the important item of interest during construction and makes no allowance whatever for the likewise important item of going concern value.

However, in developing such minimum figure, it must be understood that we do not concede that such figure would be adequate as representing the fair value of the property. The statement of the Supreme Court of California to the contrary is inaccurate (96 Cal. Dec. 367, 378; R. 136). The figure which we shall compute is merely a minimum figure developed because of the failure of the Railroad Commission to make any finding of fair value or a proper rate base.

# g. A minimum figure for fair value or rate base.

Starting, then, with said figure of \$7,949,954.00, we proceed to a consideration of the two necessary additions thereto.

## (1) Interest during construction.

Said sum of \$7,949,954 includes as interest during construction the sum of \$688,092.56 and no more (Coleman, Exh. 1. R. 209, 214; Ready, Exh. 117, R. 419, 411, col. 1, item 12).

Said sum of \$688,092.56 constitutes interest during construction on only that portion of the construction

capital which the Company secured from the sale of bonds in 1925. The sum contains nothing for interest during construction on that part of the construction capital which was secured by the Company from the sale of its capital stock or from any other source that from the sale of bonds (Ready, R. 521).

The sum of \$1,377,522.00 was expended for construction purposes by the Company prior to the time when bond money became available. No interest whatever on this money is included in said sum of \$688,092.56 (Ready, R. 521; Exh. 119, separately forwarded, Table 3, cols. 3 and 4).

Because the Company's books show interest in connection with bond money alone, the resulting figure of \$688,092.56 is materially less than the amount which must be included in a determination of the cost of the bridge for rate making purposes (R. 521).

It is, of course, clear that in determining a proper rate base, interest during construction should be allowed on all moneys, from whatever source secured, which were expended for capital account during a reasonable construction period.

As the California Railroad Commission itself said in Application of City of San Diego for Order Establishing Rates to be Charged for Water, 4 C. R. C. 902, 915:

"Considerable attention was given at the hearing to the question of interest during construction. It appears that the amount shown for interest on the books of the Southern California Mountain Water Company represents only interest on borrowed money and that no entry appears on the books to represent interest on money secured through other means, such as the sale of stock. It is, of course, clear that interest during construction should be allowed on all moneys, from whatever source secured, which were spent for capital account during a reasonable construction period."

As far as we know, this has been the uniform practice not merely of the California Railroad Commission but also of similar regulatory Commissions in other States.

Addressing ourselves now to the question of what is the amount which should properly be allowed for interest during construction in the present case in connection with the original construction costs, Mr. Mitchell, one of the Commission's own witnesses, admitted that said sum of \$688,092.56 is too low in the sum of \$415,541.44 and that the correct amount should be \$1,103,634.00 (Mitchell, R. 320; Exh. 16, R. 247, 257, col. 2—Mitchell).

Mr. Ready reported the somewhat lower total figure of \$1,070,761.00 (Exh. 117, R. 410, 411, col. 2), which figure we believe to be correct and more accurate than the somewhat higher Mitchell figure. We shall hereinafter use Mr. Ready's said figure.

Accordingly, the difference between said figure of \$688,092.56 and said figure of \$1,070,761.00, namely the sum of \$382,668.44 should be added to the sum

of \$7,949,954.02 in our search for a minimum fair value or rate base, making a corrected figure, thus far, of \$8,332,622.46.

Thus far, however, there has been no allowance for, going concern value, to which subject we shall now address ourselves.

# (2) Going concern value.

In its decisic.., the Railroad Commission did not say that it was valuing the property as a going concern. The decision not even once refers to the subject of going concern value. It is obvious that if the property was valued at all, no allowance was made, in any form or manner whatever, for going concern value.

As a plain bookkeeping fact, said figure of \$7,949,-954.00 contains nothing whatever for going concern value.

#### (a). The principle. o

For many years, the leading decision in the United States on the subject of going concern value has been Des Moines Gas Company v. City of Des Moines, 238 U. S. 153, in which case, at page 165, this Court, speaking through Mr. Justice Day, said:

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to the public use."

Among the most recent decisions is McCardle v. Indianapolis Water Co., 272 U. S. 400. At page 414, this Court, speaking through Mr. Justice Butler, said:

"The decisions of this court declare: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be consider in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.' Des Moines Gas Co. v. De Moines, 238 U. S. 153, 165; Denver v. Denver Union Water Co., 246 U. S. 178, 191, 192. And see National Waterworks Co. v. Kansas City, 62 Fed. 853, 865; Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203, and cases cited."

The Supreme Court of California conceded that the Railroad Commission made no allowance for going concern value and sought to justify such failure by reliance on Dayton Power & Light Co. v. Public Utilities. Commission of Ohio, 292 U. S. 290, Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 292 U. S. 398 and Los Angeles Gas & Electric Corporation v. Railroad Commission of California, 289 U. S. 287 (96 Cal. Dec. 367, 378-9; R. 137-8). However, none of these cases support the California court's conclusion on the facts of the present case.

In Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 292 U. S. 290, the decision itself shows very clearly that the Public Utilities Commission of Ohio did make an "allowance of the cost of developing new business" (p. 309). However, the court very properly refused to make a further and additional allowance for "going value". Such additional allowance would, in effect, have been making an allowance twice for the same item.

In Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 292 U. S. 398, the allowance claimed for this item by experts testifying in behalf of the Gas Company was "a cost not taken from the books, but merely presumed or estimated at widely variant amounts" (pp. 412-13). The Court found that the estimates submitted by said experts were "so vague as to be little more than guesses" (p. 413).

The Court, of course, held that such estimates should be disregarded. This is very different, however, from saying that a claim based on the actual facts of the company's operations with a full record of the company's receipts and expenditures from the very beginning would not have resulted in an appropriate allowance for the item here claimed by us.

In Los Angeles Gas & Electric Corporation v. Railroad Commission of California, 289 U. S. 287, the Court, at page 313, referred with approval to the long line of decisions of this Court relied upon by us and showing the necessity of making allowance for the item of cost of developing the business or going con-

cern value, in the event that there is proper evidence on that subject.

The Court found that the Railroad Commission did find a rate base which was sufficiently high to include an allowance of \$5,500,000.00 for the item of going concern value and said, with reference to this sum, that "the entire excess (of \$5,500.000.00) may be regarded as applicable to whatever intangible value the property had as a going concern" (p. 317).

Continuing, this Court, speaking through Mr. Justice Butler, said (p. 317):

"The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

The issue was not whether some allowance should be made for going concern value but, rather, whether the allowance already actually made should be increased in the much larger amounts claimed by the Company. In holding that no such additional allowance should be made, the Court held that the testimony of the Company's expert witnesses was "of a highly speculative and uncertain character" (p. 317) and that the testimony consisted of various estimates and assumptions (pp. 317-18).

In deciding that the testimony did not warrant an allowance in excess of the allowance of \$5,500,000.00 already made by the Railroad Commission, the Court concluded (p. 319):

"It is unnecessary to analyze the testimony of these witnesses, as it is obviously too conjectural to justify us in treating the failure to include their estimates as a sufficient basis for a finding of confiscation."

Before leaving this case, we desire to point out that an allowance of \$5,500,000.00 for going concern value constituted 8.4% of the rate base of \$65,500,000.00 which the Railroad Commission fixed in that case (p. 319).

Under the decisions of this Court, an appropriate allowance must be made in this case for going concern value. We shall now address ourselves to the question of what that allowance should be.

#### (b) - Usual allowance.

The amount to be added for this item depends, of course, upon the facts of the particular case.

However, an allowance of at least 10% of the cost of reproducing new physical properties is quite customary, particularly in the more recent decisions.

In McCardle v Indianapolis Water Co., 272 U.S. 400, this Court said, on this point (p. 415):

"The evidence is more than sufficient to sustain 9.5% for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that 10.0% of the value of the physical elements would be low when the impressive facts reported by the commission in this case are taken into account. (Citing numerous decisions of the Federal and State Courts)."

In New York & Richmond Gas Co. v. Prendergast, 10 Fed. (2d) 167, the District Court approved the report of the master, who made the following report on the subject of the amount of the allowance to be made for going concern value (p. 178):

"Counsel for plaintiff in their main brief have submitted a tabulation of some 31 cases in which the element of going value was considered; this tabulation showing the ratio between the amount allowed for going value and the total amount found for the physical property. Of the cases listed, 14 were court cases and 17 commission cases. The former are summarized to show an allowance for going value averaging 12.13 per cent. of the total property, and 11.7 per cent. in the latter."

The percentage of going value to estimated reproduction cost new less accrued depreciation of the physical plant was fixed at 15%.

In Consolidated Gas Company v. Prendergast, 6 Fed. (2d) 243, the District Court approved the special master's report. On the subject of the additional allowance to be made for going value, the master said (p. 259):

"'Although no definite percentage has been laid down as representing the measure of the 'going value' of a public utility company, examination of the cases has shown that courts have generally found an amount approximating 10 per cent of the sum found as the value of the tangible property, as fairly representing the 'going value'. (Mobile Gas Company v. Patterson, 293 Fed. 219; Streator Aqueduct Company v. Smith, 295 Fed. 385.)"

The master found the total fair value of the properties of the Consolidated Gas Company to be \$102,547, 110.61, which amount included \$3,500,000.00 for working capital and \$9,000,000.00 for going value. This report was approved.

In Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, 5 Fed. (2d) 77, the special master, whose report was approved, said (p. 87):

In his appraisal, the engineer has fixed this going concern value at \$815,000, or 9.67 per cent of the reproduction cost new, which would seem to be justified under the decisions in Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371; Omaha v. Omaha Water Co., 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278, 62 L. E. 649; Bluefield Water Works, etc., Co. v. Public Service Com., 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176; Minneapolis v. Rand (C. C. A.) 285 F. 818; Pacific Gas etc. Co. v. San Francisco (D. C.) 273 F. 937; Des Moines Gas Co. v. Des Moines (D. C.) 199 F. 204; Des Moines Water Co. v. Des Moines (C. C.) 192 F. 193; Venner v. Urbana Waterworks (C. C.) 174 F. 348; National Waterworks v. Kansas City, 62 F. 853, 10 C. C. A. 653, 27 L. R. A. 827; S. W. Bell Tel. Co. v Fort Smith (D. C.) 294 F. 102; Mobile Gas Co. v. Patterson (D. C.) 293 F. 208. V.

We believe that the foregoing citations will be sufficient to advise the Court as to the amounts which it has been customary for the courts, in recent decisions.

discount to the same of the same of the

to add for this factor of value. This amount is a minimum of approximately 10% of the cost of reproducing new the physical properties.

# (c) Fair allowance in present case.

In the present case, we have a remarkably complete record of all receipts and all disbursements in connection with the operations of both the Carquinez Bridge and the Antioch Bridge and the Company as a whole, from the very first day of the operation of the respective bridges through the year 1937 (Ready, Exh. 132, Tables 4, 5 and 6, R. 491, 493-4-5).

Hence, this is not one of the frequent cases in which the early expenses and receipts are missing, in which event the problem becomes largely one of guess work. In this case, the actual figures are all at hand.

If, in the present case, we take, for the first five years of operation, the very low figure of the deficiency of the income of the Carquinez Bridge below the 9% cost of money shown by the evidence, with interest, the result is the sum of approximately \$300,000.00. This sum is less than 5% of the cost of reproducing new the physical property, before consideration is given to overheads (Ready, Exh. 118, R. 415, 416) and is most reasonable under any accepted standard.

As the court said in New York Telephone Co. v. Prendergast, 300 Fed. 822, 826:

"The denial of any allowance for going value was also error of law."

So here, the Commission's failure to make any allowance for the cost of developing the business, or going concern value, constitutes clear error of law:

#### h. Summary-rate base.

The pertinent figures in the record, relating to the rate base may, accordingly, be summarized as follows:

Without anything Adding \$300,000.00
for going concern for going concern
value.

Book cost (with allowance for only por- tion of proper amount for interest dur-	/	/
ing construction)		-
Book cost (corrected by proper allow- ance for interest during construction—		
Gerwick and Ready, Exh. 117, R. 410, 411, col. 2)		<b>\$8,632,622.46</b>
Reasonable historical cost (Gerwick and		
Ready, Exh. 117, R. 410, 411, col. 3)	8,139,307.84	8,439,307.84
Reproduction cost new-1937 (Gerwick		
and Ready, Exh. 118, R. 416)	8,743,231.14	9,043,231.14
Value of investment-January 1929 (Re-		
port of California Highway Commission		
entitled "Investigation and Report on		
Toll Bridges in the State of California,"		*
page 67; see also Mitchell, R. 288)	10,676,142.00	<u> </u>
Net purchase price—October 20, 1932		
(Report entitled "Report on Investiga-		
tion of Carquinez Toll Bridge" trans-		
mitted by C. H. Purcell, State Highway		
Engineer, to Earl Lee Kelly, Director	. ,	
of Public Works, and by latter to Gov-	/	
ernor Rolph, page 38; see also Mitchell, R. 292)	10 288 840 00	
11. 202)	10,200,020.00	

The figure of \$8,632,622.46 appearing in connection with the second item in the above tabulation, namely, "Book cost corrected" is the cost shown on the books,

corrected only so as to include the proper allowance for interest during construction plus a very reasonable allowance of \$300,000.00 for going concern value. While this figure is approximately \$200,000.00 higher than the "reasonable historical cost", it is also more than \$400,000.00 lower than the estimated cost to reproduce the property new in 1937.

The figures thus far used do not include any allowance for the reasonable value of the franchise of the Rodeo Vallejo Ferry Company. This company organized American Toll Bridge Company and aided in its financing. On the completion of the Carquinez Bridge, the Rodeo Vallejo Ferry Company abandoned service, thus making available to the Carquinez Bridge its entire business and eliminating costly competition such as that which has been experienced and is now being experienced by the publicly owned and operated Golden Gate Bridge and San Francisco-Oakland Bay Bridge, by reason of existing ferry competition. The franchise of the Ferry Company had considerable value, estimated by Mr. Ready as being between \$250,-000.00 and \$300,000.00 (Ready, R. 472-4; see also Exh. 127, R. 471, 472).

We believe that we could properly claim the inclusion of said figure, but in order to be entirely fair shall not do so.

In our attempt to develop a fair value or rate base which the Railroad Commission failed to find, we shall content ourselves by submitting as a *minimum* figure said sum of \$8,632,622.46 for the purpose of testing the Commission's decision.

Money available for return on fair value under tolls fixed by Railroad Commission.

The decision of the Railroad Commission prescribed tolls for the year 1938 (Decision, R. 38).

To ascertain the amount of money available for return on the fair value or rate base, it is necessary, of course,

- (a) To determine the gross operating revenue for 1938, under the tolk prescribed:
- (b) To determine the operating and maintenance expenses, the various types of Federal, State and local taxes, depreciation and depletion; and
- (c) to substract the total under (b) from the total under (a).

No witness for the Commission made any such computation.

No witness for the Commission presented any testimony as to what reasonable operating expenses would be incurred in 1938 or what the reasonable allowance for depreciation or depletion should be or what amount of money would be available for return on fair value or rate base in that year.

As we have hereinbefore shown, the Railroad Commission failed utterly to make any finding as to any of these matters.

While the decision contains a paragraph referring to Mr. Hunter's Exhibit 23, the figures there referred to are for the year 1937 and are based on a rate suggested by Mr. Hunter but which the Commission did

not establish. No witness for the Commission presented any operating expense figures for 1938 and the tolls actually established by the Commission were not referred to by anyone at any time during the proceedings.

The Company, however, introduced evidence showing, in complete detail, all revenues and expenses for each of the Carquinez and Antioch Bridges and for the Company as a whole for each year from the beginning to and including the year 1937 and also estimates for 1938 and each year following to and including the end of the franchises in 1948, both under the rates then in effect and under the 50c toll suggested by the witness Hunter but not established by the Commission (Ready—Exh. 132, R. 493-5; Exh. 134, R. 505, 506A, B, C; and Exh. 135, R. 508-511). The originals of each of these exhibits have also been separately forwarded to the clerk of this Court.

From the data in these exhibits, it is relatively simple to compute the revenues and expenses and the money remaining for return on fair value for the year 1938 under the tolls fixed by the Commission. We are again doing the work which the Commission should have done but failed to do.

As to operating revenues for 1938, the computation can readily be made. All that is required is to take Mr. Ready's Exh. 134, Carquinez Bridge, year 1938 (R. 506 A), and make the necessary changes (due to the application of the Commission's new tolls). In making the following computation, a 10% stimula-

tion of traffic under the new rate, if it were made effective, will be assumed.

As to operating expenses for the year 1938, we may take Mr. Ready's estimates of the various types of these expenses for the year 1938 as shown in Exh. 134, Carquinez Bridge, year 1938 (R. 506 A) modified as to the California gross revenue tax, which is 2% of the new operating revenue.

The effect of the Commission's rate, as applied to the 1938 traffic, is as follows:

#### · CARQUINEZ BRIDGE-1938 Operating Revenues: 1. Tolls 4 \$1,135,277. (computed as above) 2. Rents and miscellaneous. 8,243. (Exh. 134, p. 2, 1938; R. 506A) Total \$1,143,520.(1 plus 2) Direct Operating Expense: 4. Operation and maintenance. \$ 146,700. (Exh. 134, p. 2, 1938; R. 506A) 5. Gross Revenue tax (2%): 22,706. (2% of 1) Total 169,406.(4 plus 5) 63,852. (Exh. 134, p. 2, 1938; R. 506A) 7. General expenses 8. Total direct and general ex-233,258.(6 plus 7) 206,727. (Exh. 134, p. 2, 1938; R. 506A) 9. Amortization of investment. 10. Total expenses plus amorti-439,985.(8 plus 9) zation 11. Net income before income 703,535. (3 minus 10) Income Taxes: 108,511. (Exh. 134, p. 2,1938; R. 506A) 12. Federal income tax... 13. State franchise tax.... 24,726. (Exh. 134, p. 2, 1938; R. 506A) 133,237.(12 plus 13): Total income taxes 573,222.(10 plus 14) 15. Total expense 16. Net income available for return on fair value or rate

\$ 570,298.(3 minus 15)

In its Answer to Petition for Writ of Review (R. 93), the Commission's attorneys concede that each of the above figures is correct with the exception only of the item of \$108,511.00 for Federal income taxes.

As to this one remaining item, Mr. Ready computed the same on the Company's 1937 business. The accuracy of the computation is not challenged. The only point made is that Mr. Ready should have used a figure "accrued" for 1938 instead of the actual number of dollars which would be required in 1938 for the purpose of paying Federal income taxes in that year.

These taxes are, of course, computed on the 1937 income, just as each individual taxpayer computes his Federal income tax on the preceding year's business.

We submit that Mr. Ready handled the matter correctly. This is a rate case, not an accounting case. The problem is to determine how many dollars the Company will require to meet its obligations in the year 1938 and whether or not the tolls established by the Commission will be sufficient to enable the Company to meet those obligations in 1938 and still have remaining a sufficient sum to yield to it a fair return on the fair value of its property.

This problem is to be solved, not by technical accounting rules or practices adopted in connection with entirely different matters, but by determining the number of dollars which the Company will require, in the year 1938, to meet the obligations with which it will be confronted in that year, including the payment in 1938 of Federal income tax necessarily determined on the 1937 income.

Furthermore, we invite the Court's attention to the fact that Mr. Ready's testimony, in addition to being sound in principle, is the only testimony in the record as to what allowance for Federal income taxes must be included in computing the rates for 1938." No witness for the Commission testified on that subject and there is not a word of testimony in the record contrary to that offered by Mr. Ready as to that item.

Mr. Ready obviously handled the matter in the correct way, bearing in mind that this is a rate case.

It seems too clear for further argument that a rate making problem must be settled on rate making principles.

We believe that Mr. Ready's method of handling Federal income taxes, as well as the amount of such taxes reported by him to be paid in the year 1938, are correct and that the Court may safely take said figure of \$570,298.00 as being the amount of revenue which would be available for return on fair value or the rate base in 1938 in the event that the rates prescribed by the Commission were effective throughout that year.

Said figure of \$570,298.00 is a return of only 6.6% on the *minimum* fair value of \$8,632,622.46 hereinbefore set forth.

The next problem is to determine whether or not a net income of \$570,298.00 for the year 1938 would be sufficient to yield to American Toll Bridge Company a fair return on the fair value of its property in the Carquinez Bridge.

This problem requires a consideration of the cost of the money which this appellant has invested in the Corquinez Bridge and of what, under the specific facts of this case, would be a fair and reasonable rate of return on the fair value of this appellant's property in said Bridge.

To these problems, we shall next address ourselves.

- 3. Cost of money.
- a. Hazards of enterprise.

The record shows that the construction of the Carquinez Bridge was a hazardous enterprise. There were grave doubts as to whether the bridge could be constructed at all. But the pluck and courage of the management, aided by several thousand small California investors in the Company's capital stock finally prevailed.

The Carquinez Bridge was the pioneer among the toll bridges across San Francisco Bay. It was built before Government funds were available for such projects and before many of the engineering problems had been solved.

At the time the Carquinez Bridge was built, it was the first of a series of long span bridges that were built in the United States and the first structure of the kind to be built in the vicinity of San Francisco Bay. The foundations of the bridge were among the deepest ever constructed. The construction was complicated by conditions in the Carquinez Straits, such as swift current and deep water (Mitchell, R. 258).

The water at Pier 3 was 80 feet deep before work commenced. Later, with scouring, it reached a depth of 115 feet in very soft ground, with rock at a depth of 135 feet (Derleth, R. 367).

The speed of the current ranged between 5 and 7 feet per second, a very high speed. This speed was higher than the speeds which the engineers encountered at the Golden Gate Bridge (Derleth, R. 367).

There were further grave doubts as to whether the bridge, if completed, would attract sufficient patronage to justify its construction from a financial point of view. The population in the San Francisco Bay territory was not as yet "bridge-minded".

These and other hazards and difficulties, physical and financial, had an inevitable effect in increasing the difficulty in securing the necessary construction funds and in increasing the cost of the money.

# b. Necessity of first securing funds from sources other than bonds.

It was impossible for the Company to secure money from the sale of bonds until after the work was sufficiently advanced so as to give reasonable assurance that the bridge could be built (Derleth, R. 386).

The moneys secured from the sale of capital stock to several thousand small California investors, from advances from the Rodeo Vallejo Ferry Company and from other sources, before bond money could be made available, amounted, up to June 30, 1925, to the sum of \$1,377,522.00 (Ready, Exh. 119, separately forwarded, Tables 2 and 3).

It was not until April, 1925, that arrangements were finally entered into for the sale of the Company's original bonds. This was two years after the commencement of construction work (Coleman, Exh. 1, R. 209, 221).

#### e. Original bond issue-1925.

Finally, in 1925, the Company sold its bonds as follows:

\$4,500,000.00 of first mortgage 7% bonds; and \$2,000,000.00 of second mortgage 8% bonds (Coleman—Exh. 1, R. 209, 221).

It was necessary to sell the bonds at a discount of 10%. The total discount and expense incurred was \$673,853.00. The net amount realized from the sale of bonds was \$5,826,147.00 (Exh. 1, R. 209, 222).

## d. Cost of money on original bond issue.

The cost of money secured by the Company from its original bond issue was as follows:

On the straight line basis—9.71 per cent; On the sinking fund basis—9.07 per cent. (Ready, Exh. 129, R. 476, 477).

Mr. Coleman, a witness for the Commission, likewise reported that the cost of the money, with amortization of bond discount and expense computed on the straight line basis, was 9.71% (Coleman, Exh. 1, R. 209, 222). Mr. Coleman did not testify as to the cost on the sinking fund basis.

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 Comparison with cost of bond money of other California utilities— 1925.

In Table 1, attached to Exh. 129 (R. 476, 481), Mr. Ready sets forth the cost of bond money to some of the larger California public utilities in and about the year 1925, as shown from decisions of the Railroad Commission and exhibits filed in the proceedings. The utilities thus listed include

Los Angeles Gas and Electric Corporation San Joaquin Light and Power Corporation San Diego Consolidated Gas and Electric Company

Pacific Telephone and Telegraph Company Southern California Gas Company Pacific Gas and Electric Company Great Western Power Company

The average cost of bond money to these utilities was 6%, as compared with a cost of first mortgage bond money to American Toll Bridge Company in 1925 amounting to 8.37% (Ready, Exh. 129, R. 476.478). It thus appears that the cost of first mortgage bond money to American Toll Bridge Company in 1925 was approximately 1.39 times the cost of bond money to major utilities of California at or about the same time.

This substantially higher cost of bond money to American Toll Bridge Company reflects the much greater hazard of its enterprise and the lesser desirability of its bonds from the investors' point of view.

#### f. Bond refunding issue-1935.

During the first twelve years of the term of its franchise, American Toll Bridge Company paid no dividends on its stock.

By 1935, the Company had reduced its outstanding bonds from \$6,500,000.00 to \$4,180,500.00, the latter amount being approximately one-half of the investment in the property. For the purpose of retiring these remaining bonds, the Company at that time sold an issue of refunding bonds totaling \$4,300,000.00 bearing interest at the rate of  $5\frac{1}{2}\%$  per annum. These bonds were sold at  $96\frac{1}{2}\%$  of their face value plus accrued interest (Coleman, Exh. 1, R. 209, 222).

# g. Cost of money on refunding bond issue-1935.

The cost of this money, before making allowance for the amortization of the remaining unamortized bond discount and expense and premium of the original bond issue, was 6.7% with amortization on the straight line basis and 6.65% with amortization on the sinking fund basis (Ready, Exh. 129, R. 476, 478). When allowance is made for the amortization of said unamortized bond discount, expense and premium of the original bond issue, these cost percentages become as follows (Ready, Exh. 129, R. 476, 478):

Amortization on the straight line basis—9.45% Amortization on the sinking fund basis—8.95%

These figures also appear in the testimony of Mr. Ready (R. 485).

h. Comparison with cost of bond money of other California utilities\_ 1935.

In Table 2 attached to Exhibit 129, Mr. Ready sets forth the cost of bond money to various California gas and electric companies, telephone companies and water companies which refinanced their outstanding bonds in or about the year 1935, as shown in various decisions of the Railroad Commission (R. 476, 482).

Said table shows an average cost of bond money in connection with refinancing, of approximately 4% for the major utilities and 5% for the smaller utilities (Ready, Exh. 129, R. 476, 479, 482).

As has already been shown, the bond refinancing of American Toll Bridge Company in 1935 was done at a cost of money of 6.65% before the inclusion of the unamortized bond discount and expense and premium of the original issue (Exh. 129, R. 476, 479).

It thus appears that in 1935 refunding bond money cost American Toll Bridge Company 1.66 times the similar cost to larger California utilities refinancing about that time and 1.33 times the cost of bond money to the smaller California utilities (Exh. 129, R. 476, 479).

These figures show the substantially higher cost of bond money to American Toll Bridge Company in connection with bond refinancing as late as 1935, as compared with large and small public utilities issuing refunding bonds at about the same time under authority of the Railroad Commission.

# i. Summary-cost of bond money.

It thus appears that the cost of bond money in connection with the original 1925 issue and the 1935 refunding issue of the bonds of American Toll Bridge Company was as follows:

	Straight line amortization	Sinking fund amortization
Original bonds-1925	9.71%	9.07%
Refunding bonds-1935	9.45%	8.95%

From these figures, it is fair to assume a cost of bond money to the Company amounting to 9% (Ready, R. 521-2).

#### j. Cost of all money from bonds and stock and in depreciation reserve.

In Exhibit 129 (R. 476, 480), Mr. Ready presents an interesting and important table which shows the amount of the capital of American Toll Bridge Company which, in each year of the Company's operations from 1926 to 1948, is derived from bond and stock money and what percentage is invested in the depreciation reserve. As would be expected, the amount of the capital derived from bond and stock money is almost 100% in 1926 and falls to practically nothing in 1948. On the other hand, the amount of money in the depreciation reserve increases from almost nothing in 1926 to almost 100% in 1948, at which time the title to the Carquinez and Antioch Bridges will pass to the adjacent counties.

In another column, Mr. Ready takes the average cost of money from bonds and stock at 9%, being the figure heretofore shown to be correct, and assumes a 6% cost

of money in the depreciation reserve. On these bases, he reports the average cost of money to American Toll Bridge Company for each year, ranging from 8:9676% in 1926 to 6.0516% in 1948.

The average cost of money for the year 1938, which is the year here under consideration, is shown to be 7.8510%.

From this testimony, appears the very important fact that the average cost of the money invested by American Toll Bridge Company in its two bridges, whether such money was secured from the sale of bonds or the issue of stock or whether it is now invested in the depreciation reserve, is, for the year 1938, 7.8510%.

No other witness testified on the subject and this testimony stands unchallenged in the record.

## 4. Fair rate of return.

We next address ourselves to the question of what, under the specific facts relating to American Toll Bridge Company, would be a fair rate of return to be accorded to that Company.

# a. Railroad Commission's established policy.

The Railroad Commission's established policy has been and is to allow a rate of return somewhat in excess of the cost of the money invested in the public utility's properties.

As the Commission said in Application of Pacific. Telephone and Telegraph Company, 33 C. R. C. 737. 773:

"A reasonable return will normally be in excess of the average cost (of noney). This principle has been enunciated by this Commission in numerous decisions."

The statement of the Supreme Court of California (96 Cal. Dec. 367, 380; R. 139) that appellant is not entitled to a rate of return as high as the cost of its money, is directly contrary to the policy which the Commission has, for many years, pursued and is not supported by any reference to any court case.

The California court further said that "A glance at the figures of the present bond issue . . . sufficiently indicates that the percentage claimed is not the meas; ure of today's needs" (96 Cal. Dec. 367, 380; R. 139). To this comment, we make the following reply:

- (1) The California court intimates that the cost of money in connection with the refunding bond issue of 1935 was less than that in connection with the original bond issue of 1925. Ergo, allow a lower rate of return. However "a glance at the figures of the present bond issue" shows that the cost of money in connection with that bond issue was 8.95%, with amortization on the sinking fund basis, a figure only slightly below the rate of return of 9.029% which, as we have shown, we believe to be fair.
  - (2) The proposed test of "the measure of today's needs", is, as we shall hereinafter show, an entifely false test when applied to a utility which is not and will not be in the market for any funds for additional capital expenditures.

Mr. J. G. Hunter, one of the Commission's witnesses, in response to questions from counsel for American Toll Bridge Company, testified to the same effect, as follows (R. 347):

"Q. (By Mr. Thelen): As a matter of fact, isn't it the policy of the Commission to ascertain the cost of money and then to allow something in excess of that? Hasn't that been the policy throughout all the years?

"A. (By Mr. Hunter): I rather think so.

"Q. Then in this case, Mr. Hunter, don't you think when it comes to the fixing of the actual rate, that it would be proper for the Commission to ascertain the cost of money and then make some additional allowance over that?

"A. Well, I should say the Commission should follow its precedents as much as it can if they have a case that is anywhere comparable."

By reference to decisions rendered by the Railroad Commission in many public utility rate cases, Mr. Ready showed the consistent application of said policy and the extent to which the rate of return as allowed has exceeded the cost of money to said utilities. This testimony appears in Table 3 attached to Exhibit 129 (R. 476, 483).

Mr. Ready there sets forth, as to important California public utilities, the weighted average cost of money, with dissumt and expense on the sinking fund basis, as the same appears in the exhibits of the Commission's witnesses in said cases, together with the rate of return found by the Railroad Commission to be reasonable as to these particular utilities.

The following table shows the names of the utilities, the weighted average cost of money, the rate of return found by the Railroad Commission to be reasonable and the ratio of said rate of return to said weighted average cost of money (R. 476, 479):

	. 0		Ratio of rate of return to
NAME OF UTILITY	Cost of money	Rate of return	cost of
Southern California Gas Company_	7.0%	9.0%	1.28
Pacific Telephone and Telegraph Company	6.09%	7.0%	1.15
Los Angeles Gas and Electric Corporation		7.0%	1.14
San Joaquin Light and Power Corporation	6.36%	7.0%	1.10
Midland Counties Public Service Corporation	5.81%	7.0%	1.20
Pacific Gas and Electric Company_	_ 5:82%	6.7%	1.15
San Diego Consolidated Gas and Electric Company	6.43%	6.7%	1.04
10			45

It thus appears that in the case of these large and well established public utilities the Commission, in rendering its decisions as to the rates to be charged by them, allowed a rate of return which, on the average, is 1.15 times the weighted average cost of money to said utilities, respectively, figuring bond discount and expense on the sinking fund basis (Ready, Exh. 129, R. 476, 480; also R. 489).

to said large and well established California public utilities, it would seem that a multiple at least as

b. Application of usual policy to facts of present case.

large, if not larger, should be applied in the case of the much smaller and less firmly established American Toll Bridge Company.

However, taking said multiple of 1.15, Mr. Ready (Exh. 129, R. 476, 480), applied it to the average cost of money to American Toll Bridge Company, computed as hereinbefore explained. The fair rate of return thus computed is found to range from 10.313% in 1926 (with a minimum of depreciation reserve money at 6%) down to 6.959% in 1948 (with a maximum of depreciation reserve money at 6%).

The fair rate of return thus found by Mr. Ready for the year 1938 is 9.029% (Exh. 129, R. 476, 480, last column).

This is the rate of return which appellant claims to constitute a fair and reasonable return for the year 1938 on the facts of this case and on the principles which the Railroad Commission itself has heretofore almost uniformly followed. This statement, as will be readily understood, is made only on the assumption that the Court finds it necessary to go beyond the point of impairment of contract obligations.

c. Comparison with rates of return allowed by Railroad Commission to other utilities.

We now invite the Court's attention to another test based on the Railroad Commission's own decisions as to other public utilities and leading to the same conclusion.

This test is the relationship between the cost of bond money, both in 1925 and 1935 and the rate of return

actually allowed to said utilities by the Railroad Commission in rate cases.

In and about 1925, the cost of bond money to the important public utilities listed in Table 1 attached to Exh. 129, was between 5.65% and 6.35%, whereas the cost of bond money to American Toll Bridge Company, in connection with the first mortgage bonds issued by it in that year was 8.37%. The cost of its first mortgage bond money to American Toll Bridge Company was thus 1.37 times the average cost of the bond money of said other utilities (Exh. 129, R. 476, 478).

Turning now to 1935, in which year numerous major public utilities in California refinanced at materially reduced interest rates, the cost of money in connection with the refunding bond operations of American Toll Bridge Company, excluding unpaid expenses in connection with the original issue, was 1.33 times the average cost of bond money to the smaller public utilities listed in Table 2 attached to Exh. 129 and 1.66 times the average cost of bond money to the larger public utilities there listed (Ready, Exh. 129, R. 476, 479).

It thus appears that the cost of first mortgage bond money to American Toll Bridge Company, both in 1925 and in 1935 was from at least one-third to two-thirds greater than the average cost of bond money to better established and less hazardous public utilities in California to whom the Commission has allowed an average return of approximately 7%.

Taking 7% as the average rate of return allowed by the Railroad Commission to these less hazardous public utilities (Ready, Exh. 129, R. 476, 483, 488) and applying said multiple of 1.33 thereto, the result would be a rate of return of 9.33%, which figure does not vary greatly from that secured in the preceding section of this brief.

#### d. Rates of return found necessary to avoid confiscation.

We shall now invite the Court's attention to decisions of this Court and of the lower Federal courts on the question of the rate of return which is necessary to avoid confiscation.

In Brush Electric Company v. City of Galveston, 262 U.S. 443, this Court affirmed the decree of a U.S. District Court finding that an electric light and power company operating in the City of Galveston was entitled to a return of 8 per cent. (p. 445).

In Bluefield Water Works & Improvement Company v. Public Service Commission of West Virginia, 262. U. S. 679, involving an order of a state commission fixing rates to be charged for water, the Court concluded (p. 695):

"Under the facts and circumstances indicated by the record, we think that a return of 6 per cent upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service."

In United Railways and Electric Company of Baltimore v. West, 280 U. S. 234, this Court held that in

the light of recent decisions of the Court and of the lower Federal courts, it is probable that a return of 71/2% or 8% is necessary to avoid confiscation.

At page 251, the Court, speaking through Mr. Justice Sutherland, said:

"It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest or mere in-Sound business management requires vestment. that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, a return of 6.26 per cent. is clearly inadequate. In the light of recent decisions of this Court and other Federal decisions, it is not certain that rates securing a return of 71/2 per cent. or even & per cent. on the value of the property would not be necessary to avoid confiscation."

In Los Angeles Gas & Electric Corporation v. Railroad Commission of California, 289 U. S. 287, the Court found that "considering the financial history of the company" and other factors, it could not hold a return of 7% to be so low as to be confiscatory. The financial history of the company thus referred to is shown in a Note on page 292 to have been as follows:

"Dividends have been paid on its common stock of 7.20 per cent. per share (\$100 par value) in 1916, 1917 and 1918; 7.4 per cent. in 1919; 8.4 per cent. in 1920, 1921 and 1922; 8.7 per cent. in 1923; 33.75 per cent. in 1924, included in which is 25 per cent. as a stock dividend of \$2,500,000; 9 per cent. in 1925; 9.815 per cent. in 1926; 35.17 per cent. in 1927, which includes a stock dividend of 21.42 per cent., or \$3,000,000; 15 per cent. in 1928, and 17 per cent. in 1929. The Company's surplus has grown from \$381,212.97 in 1916 to \$4,176,663.09 in 1929, while its depreciation reserve increased from \$3,804,383.36 to, as said above, \$16,804,105.15."

It can readily be understood that even though a return of 7% might not be held to be confiscatory as to one of the largest and most prosperous utilities in the United States, a return of at least 2% more would be required for a small; hazardous enterprise with only 9 years more of franchise life, such as American Toll Bridge Company.

In Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 292 U. S. 290, this Court found that on the facts of that case and in the light of business conditions then existing a return of 6½% was not confiscatory.

In West v. Chesapeake & Potomac Telephone Company of Baltimore, 295 U.S. 662, Mr. Justice Roberts.

referred to a rate of return necessary to afford just compensation as follows (p. 671):

"So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value."

In a foot-note the Court cites a large number of Federal decisions in support of that principle. As will be observed, the utility must be accorded "a reasonable rate of return" upon fair value. Anything less than that is confiscation.

The rates of return held requisite in a representative list of decisions of lower Federal courts within the last few years are as follows:

- 8% in Reno Power, Light & Water Co. v. Public Service Commission of Nevada, 298 Fed. 790, 803;
- 8% in Louisiana Water Co. v. Public Service Commission of Missouri, 294 Fed. 954, 957;
- 8% in Indiana Bell Telephone Co. v. Commission, 300 Fed. 190, 201;
- 8% in New York & Queens Gas Co. v. Prendergast, 1 Fed. (2d) 351, 370;
- 7½% in Duluth St. Ry. Co. v. Railroad, and. Warehouse Commission of Minnesota, 4 Fed. (2d) 543, 550;
  - 8% in Brooklyn Union Gas Co. v. Prendergast, 7 Fed. (2d) 628, 672;
  - 8% in Springfield Gas & Electric Co. v. Public Service Commission of Misscuri, 10 Fed. (2d) 252, 255;

8% in New York & Richmond Gas Co. v. Prendergast, 10 Fed. (2d) 167, 187;

7½% in Pacific Telephone and Telegraph Co. v. Whitcomb, 12 Fed. (2d) 279, 286:

8% in Brooklyn Borough Gas Co. v. Prendergast, 16 Fed. (2d) 615, 622.

The public utilities involved in the foregoing cases were all stable, well-established concerns, none of them confronted with an imminent termination of their business and loss of their property.

If an 8% rate of return was deemed necessary to avoid confiscation as to most of them, it would seem only fair and reasonable that the return to be accorded to American Toll Bridge Company, with its difficulties and hazards, in order to avoid confiscation, should be not less than 9%.

In Clark's Ferry Bridge Co. v. Public Service Commission of Pennsylvania, 291 U. S. 227, this Court held that a return of 7% was adequate (p. 241). However, there was nothing to show any elements of hazard in connection with the construction, financing or operation of this particular toll bridge. A predecessor toll bridge had been erected at the same spot in 1828 and had been operated for almost a century (Herring v. Clark's Ferry Bridge Co., P. U. R. 1926D 514, decided by the Pennsylvania Public Service Commission on June 8, 1926).

The successful history of the old bridge in meeting the actual traffic conditions for almost a hundred years necessarily had a very favorable influence on

the cost of financing the new bridge (Public Service Commission of Pennsylvania v. Clark's Ferry Bridge. Co., P. U. R. 1932C 295, 301, decided by the Pennsylvania Public Service Commission on February 2, 1932). The situation with reference to the cost of money in connection with the construction of the new bridge was obviously very different from that of the present case, in which there never had been a toll bridge at this location, and in which there were great physical hazards which naturally raised questions as to whether the bridge could ever be constructed and great traffic hazards arising from the uncertainties as to which way the traffic would move and in what volume. None of these hazards were present in connection with the construction of the new Clark's Ferry bridge.

We have found one toll bridge rate case in which the investment was declared by the State Commission to be hazardous. In Re Purcell-Lexington Toll Bridge Company, P. U. R. 1925A 253, decided by the Oklahoma Corporation Commission on August 26, 1924, the Commission had under consideration the tolls charged by a toll bridge across the South Canadian River between the towns of Purcell and Lexington, Oklahoma.

The Commission found that the investment was "an extremely hazardous investment" and that, accordingly, a fair rate of return on the fair value of the property would be 12% (p. 259).

e. Only witness who testified as to what fair rate of return would be was Mr. Ready.

No witness for the Railroad Commission testified as to what a fair rate of return would be.

The only witness who testified on that subject was Mr. Ready. It was his testimony that a fair return on the fair value of the Carquinez Bridge for 1938 would be 9.029% (Ready, Exh. 129, R. 476, 480).

Appellant respectfully submits that, on the record of this case, it is entitled, to avoid confiscation, to a return of 9% on the fair value of the Carquinez Bridge property if the case is to be decided on the issue of confiscation and not on the issue of impairment of contract obligations.

- 5. In the light of the specific facts of the Carquinez Bridge, a return of only 6.6% on fair value is confiscatory.
- a. The return is substantially below what the Commission itself found would be a reasonable return.

In its decision, the Commission said (R. 38):

"The results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure. When tested upon the bases usually followed by the Commission, such a rate of return is reasonable for this particular company, considering the unusual circumstances under which its properties were constructed and have been and are operated."

But the tolls established by the Commission for the Carquinez Bridge will yield a return of not to exceed 6.6%. Hence, on the Commission's own finding as to what would constitute a reasonable rate of return, the Commission's order is clearly shown to be confiscatory.

b. The return is far below the actual cost of the money.

Furthermore, as we have shown, the cost of the money actually expended in the construction of the Carquinez Bridge was, on the *lower* of the two possible amortization bases, 9.07% (Exh. 129, R. 476, 477).

Also, the cost of the money involved in the bond refunding operation of 1935 was, again on the *lower*, of the two possible amortization bases, 8.95% (Exh. 129, R. 476, 478).

On these facts, a return of only 6.6% is clearly confiscatory.

c. There is here no question as to the cost of money now required by appellant for further capital expenditures.

In Bluefield Water Works & Improvement Company v. Public Service Commission, 262 U. S. 679, this Court said (p. 692):

"The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

While we concede that such a test is eminently fair and proper as to an expanding utility which requires additional funds to make improvements and other capital expenditures, we submit that this and similar tests are inapplicable to a company such as appellant. This Company will not be called upon to make further capital expenditures. Its toll bridge has been constructed and it will have no occasion to go into the security markets to obtain funds for expansion or improvement.

Its chief concern is that it be permitted earnings sufficient so that it may be able to withdraw its capital from the enterprise, with reasonable interest to its bondholders and fair dividends to its stockholders, by the time when it will be divested of its property on the expiration of its franchises in 1948.

Anything less than that is confiscation.

# 6. Conclusion on confiscation of Carquinez Bridge.

We have shown that a return of only 6.6% on a minimum fair value of the Carquinez Bridge would be

- —less than the return of 7.5% which the Commission found that the Company should receive (R. 38);
- —less than actual cost in 1938 of all the money in the project, determined to be 7.851% (Ready, Exh. 129, R. 476, 480);
- —less than the cost of money in connection with the original bond issue of 1925, determined by Mr. Coleman and Mr. Ready to be 9.71% (Coleman, Exh. 1, R. 209, 222; Ready, Exh. 129, R. 476, 477);
- —less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95% (Ready, Exh. 129, R. 476, 478);

- far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money; and
- —substantially less than the rates of return which the Federal courts have generally required to avoid confiscation even in the cases of well-established and prosperous utilities.

We have also shown that a return of 9 per cent is

- -required by the application to the actual cost of money of the average multiple heretofore used by the Commission (1.15×7.851=9.029%, or 1.28×7.851=10.05%); (Exh. 129, R. 476, 479);
- —in line with the rates of return allowed by the Commission to larger and more stable California public utilities, bearing in mind the substantially higher cost of first mortgage bond money to appellant (1.33×7.0=9.31%);
- -in line with the rates of return required by the Federal courts to avoid confiscation, bearing in mind the higher cost of money, the greater hazards and the shorter life of appellant; and
- in line with rates of return which have been found, proper for hazardous toll bridge companies, as illustrated by the 12% return allowed by the Oklahoma Corporation Commission.

Finally, on this point, we invite the Court's attention to the fact that the only witness who testified on the subject of what a fair return would be under the specific facts of this case was Mr. Ready and that it is his testimony that a fair return on the fair value of the Carquinez Bridge for 1938 would be 9.029% (Exh. 129, R. 476, 480, last column).

We submit, with confidence, that the Commission's decision confiscates appellant's property in the Carquinez Bridge and violates the appellant's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States.

B. THE RAILROAD COMMISSION'S OBDER CONF. SCATED AP-PELLANT'S PROPERTY IN BOTH THE CARQUINEZ AND THE ANTIOCH BRIDGES BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE.

#### 1. Rate base.

The Railroad Commission made no finding as to the fair value or a proper rate base of the Antioch Bridge or of any factor which it would be necessary to consider in fixing tolls to be charged by that bridge.

The evidence, however, contains all the data from which all such factors could have been determined.

The Company's investment in the Antioch Bridge is recorded on its books as \$1,734,477.02 (Coleman, Exh. 1, R. 209, 217).

The reasonable historical cost of the Antioch Bridge, without allowance for the cost of developing the business, is \$1,597,789.00 (Gerwick and Ready, Exh. 120, R. 432).

The estimated cost of reproducing the bridge new as of 1937 is \$1,705,964.00 (Gerwick and Ready, Exh. 121, R. 435).

If the same method of determining the cost of developing the business is used as to the Antioch Bridge as we hereinbefore used with reference to the Carquinez Bridge (income below a 9% cost of money,

1926 to 1929, incl.), the minimum amount to be added for this item is found to be \$550,000.00.

On the basis hereinbefore used for determining minimum fair value of the Carquinez Bridge, and taking the lowest of said figures for the Antioch Bridge, a minimum fair value of both bridges together would be as follows:

Fair value of both bridges \$10,780,411.00

This figure may be compared with the following figures heretofore reported in public documents by the California Highway Commission and the Department of Public Works, prior to the time when the present controversy arose:

Fair purchase price, both bridges, (October 20, 1932)—"Report on Investigation of Carquinez
Toll Bridge" submitted by State Highway Engineer C. H. Purcell to Director of Public Works
Earl Lee Kell, and by the latter to Governor
Rolph, page 38 (see also Mitchell, R. 291)——\$11,032,140.00

In this brief, we shall take as the *minimum* fair value of both bridges together, the *lowest* of said three figures, namely, \$10,780,411.00.

2. Money available for return on fair value under tolls fixed by Railroad Commission.

The amount of money which would be available in 1938 for return on fair value, in the event that the

tolls fixed by the Commission should become effective as to both the Carquinez and the Antioch Bridges, can readily be ascertained by recourse to Mr. Ready's Exhibit 134 (R. 505, 506 C).

It will merely be necessary to turn to page 4 of that exhibit, relating to American Toll Bridge Company's operation of both toll bridges, year 1938 (R. 506, 506 C), and make the necessary changes in operating revenue (due to the application of the 45¢ plus 5¢ proposed tolls) and in the item of gross revenue tax.

Here, also, we shall assume a 10% stimulation in the business of both bridges, combined, resulting from the assumed effectiveness of the new tolls prescribed by the Commission.

The effect of the new tolls, applied to both bridges, on 1938 traffic, would be as follows:

CARQUINEZ AND ANTIOCH BRIDGES TOGETHER-1938

Op	erating Revenues:	
	TollsRents and miscellaneous	\$1,241,976.(computed as above) 8,363.(Exh. 134, p. 4, 1938; R. 506C)
3.	Total	\$1,250,339.(1 plus 2)
4. 5. 6.	Operating Expenses: Operation and maintenance Gross revenue tax (2%)  Total General Expenses	\$ 189,885.(Exh. 134, p. 4, 1938; R. 5060) 24,839.(2% of 1) 241,724.(4 plus 5) 69,860.(Exh. 134, p. 4, 1938; R. 5060)
8.	Total direct and general ex- pers s	284,584.(6 plus 7)
10.	Total expenses plus amortization	529,471.(8 plus 9)

11. Net income before income taxes	720,868.(3 minus 10)
Income Taxes:	
12. Federal income tax	92,173.(Exh. 134, p. 4, 1938; R. 506C)
13. State franchise tax	22,375.(Exh. 134, p. 4, 1938; R. 506C)
14. Total income taxes_ 15. Total expense	114,548.(12 plus 13) 644 019 (10 plus 14)
10. Total Capolist	original (10 pres 11)
16. Net income available for re-	
turn on fair value or rate	
base	606,320.(3 minus 15)

The foregoing figures were computed in exactly the same manner as the corresponding figures in the companion tabulation as to the Carquinez Bridge—1938, appearing on page 148 of this Brief; and by the same witness (Mr. Ready).

We assume that the attorneys for the Commission will concede that each of said figures is correct, except that they will take the same position as heretofore with reference to the item of Federal income tax. As to that item, we are satisfied that our position is correct.

On said minimum fair value or rate base of \$10,-780,411.00 hereinbefore set forth for the combined Carquinez and Antioch Bridge properties, a net income of \$606,320.00 would yield a return of only 5.6%.

This is the really significant figure in the case, under the issue of confiscation, for the reason that it was the Commission's duty to fix the tolls for both the Carquinez and the Antioch Bridges, being competitive parts of the single, unified transportation system of American Toll Bridge Company.

The Commission could not lawfully sever the Carquinez Bridge from the single, unified transportation system of American Toll Bridge Company and fix tolls for that bridge alone, with the design of fixing tolls lower than could possibly be fixed by it for both bridges, then relying on the force of competition to drive the Antioch Bridge tolls down to the unfairly low level thus fixed for the Carquinez Bridge.

 Effect of Commission's decision would be to confiscate property of American Toll Bridge Company in both Carquinez and Antioch Bridges.

A return of only 5.6% on both bridges together would be-

- (1) 7.5%—5.6%=1.9% below the rate of return which the Commission itself found would be reasonable for the Company;
- (2) 9.71%—5.6%=4.11% below the cost of the bond money actually used in the construction of the Company's bridges;
- (3) 8.95%—5.6%=3.35% below the cost of money resulting from the bond refunding operation of 1935; and
- (4) 7.851%—5.6%—2.251% below the cost as of 1938 of all money invested in the two bridges.

We believe it to be too clear for further discussion that the Commission's tolls will, if permitted to become effective, confiscate the transportation system of American Toll Bridge Company, consisting of the Carquinez and the Antioch Bridges, and violate the Company's rights under Section 1 of Article XIV

of the Amendments to the Constitution of the United States.

C. THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH BRIDGES, FOR THE FURTHER REASON THAT IT FAILED TO RECOGNIZE AND GIVE REFECT TO THE RIGHTS OF APPELLANT IN ITS WASTING ASSETS, NAMELY, THE CARQUINEZ AND ANTIOCH BRIDGES, THE TITLE TO BOTH OF WHICH BRIDGES WILL PASS TO THE ADJACENT COUNTIES ON THE EXPIRATION IN 1948 OF THE FRANCHISES GRANTED BY SAID COUNTIES FOR THE CONSTRUCTION AND OPERATION OF SAID TWO BRIDGES.

The Carquinez and Antioch Bridges of American Toll Bridge Company are "wasting assets".

At the expiration of the franchises in 1948, the bridges will become the properties of the Counties of Contra Costa and Solano and the Counties of Contra Costa and Sacramento, respectively, without the payment of any compensation to American Toll Bridge Company (Coleman, Exh. 1, R. 209, 227; Hunter, Exh. 19, R. 264, 269, 272).

With each day that passes, the Company's assets in its two bridges are "wasting away", looking to the day when the franchises expire in 1948.

Unless American Toll Bridge Company has, by the time the life of its franchises expire in 1948, fulfilled its obligations to its bondholders and its stockholders and has received back its investment, it will never be able to do so.

#### 1. The Law of Wasting Assets.

It is well established that a public utility which owns and operates a wasting asset is entitled to receive rates sufficiently high so that, in addition to being able to pay its expenses of operation, maintenance and taxes and receiving a fair return, it will also be able to take care of both depreciation and depletion.

In Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, 292 U. S. 398, the question related to the rates charged by appellant for natural gas sold in Columbus, Ohio. At page 404, this Court, speaking through Mr. Justice Cardozo, said:

"To withhold from a public utility the privilege of including a depletion allowance among the operating expenses, while confining it to a return of 6½% upon the value of its wasting assets, is to take its property away from it without due process of law, at least where the waste is inevitable and rapid."

### Again, at page 405:

"We hold that a fair price for gas delivered at the gateway includes a reasonable allowance for the depletion of the operated gas fields and the concomitant depreciation of the wells and their equipment."

In Arkansas-Louisiana Gas Co. v. City of Texarkana, 17 Fed. Supp. 447, the District Court, speaking of "depletion and depreciation allowances", said (p. 460): "In all cases of this character (rates for natural gas), it is necessary that the plaintiff be allowed to burden operations with a charge sufficient to cover depletion and depreciation. The former is necessary in order to reimburse the utility for wasting assets and the latter is to cover the wear and tear incident to the use of physical property. In connection with wear and tear, consideration must also be given to obsolescence and inadequacy."

In United Fuel Gas Company v. Railroad Commission of Kentucky, 13 Fed. (2d) 50, the question likewise related to rates to be charged for natural gas, obviously a wasting asset. At page 518, the court said:

"The location and quantity of natural gas below the surface of the earth is at best highly speculative, and when such gas is once exhausted it cannot be reproduced or replaced. Because of the exhaustible character of his product, the natural gas operator is entitled to receive through the rates charged, not only his actual expenditures of operation and depreciation charges, in the gense of such sum as will keep his plant at 100 per cent. operating efficiency, but he is also entitled to such rates as will refund to him his entire capital investment within the life of the busi-When the field is finally exhausted, as it must be, the reserve for depletion, or amortization reserve, should be sufficient to repay to the investor 100 per cent. of the original investment. Not only is the natural gas itself subject to exhaustion, but large quantities of casing in the wells, pipe line in the field and elsewhere, and

other plant investment, are practically lost upon the exhaustion of the field. The cost of salvaging such material would, in many instances, be more than its value. The right to this amortization or depletion reserve, or the right of the company to earn such sum as would reimburse the investor for his original capital investment at the termination of the business, is universally recognized. This is in addition to what is ordinarily denominated a charge for depreciation or deterioration by use.

"So far as this factor alone is considered, it would seem quite manifest that such amortization or depletion reserve must be calculated upon the investment, and not upon the present value of the so-called acreage. The investor is entitled to reimbursement through this reserve only to the extent of his original investment, plus a reasonable earning during the period of operation. the ordinary utility, the law contemplates an indefinite continuance of the business, and allows no earnings in excess of a reasonable return, which will ultimately return to the investor the amount of his capital investment in cash. In a natural gas utility, we must look forward definitely to the complete exhaustion of the gas supply and the termination of the business upon a future day, which is certain to come. When that day does come, the operator will have been deprived of none of his property without due process of law, if he then receives back the amount of his original investment, plus a reasonable return for the period during which it has been devoted to the public use."

At page 523, the court further said:

"Attention has already been called to the fact that there is a marked distinction between depletion, in the sense of the exhaustion of supply, and depreciation, in the sense of deterioration of equipment from age and use. We have pointed out that a depletion charge, in estimating the reasonable rate, must be figured upon the investment value, and over the entire estimated life of the properties. It must be such that, upon the exhaustion of the properties, the operator will have received his entire investment, plus a reasonable return upon such investment, during the dedication of it to public use."

This decision was affirmed on appeal. United Fuel Gas Company v. Railroad Commission of Kentucky, 278 U.S. 300.

# 2. The Railroad Commission refused to apply the law of wasting assets.

The Railroad Commission, while recognizing that the Carquinez and Antioch Bridges are wasting assets, refused to apply to them the law of wasting assets. The Commission took the position that because it had only very recently (1937) acquired any jurisdiction over toll bridge corporations, it was not interested in their financial condition in the past but only "from now on".

On the subject of the proper definition of the words "wasting assets" as applied to a situation such as that now before this Court, Mr. Coleman, one of the Commission's financial experts, testified as follows (R. 343):

"Q. (By Mr. Thelen): Now when Mr. Rowell asked you that question, referring to a wasting

asset, please state whether you understood that term, as applied to the facts in this case, to mean that the investment from the beginning is to be treated as a wasting asset and is to be returned with fair interest or dividends by the time the franchise expires?

"A. (By Mr. Coleman): I think that is correct. I have considered that here was an asset whose value would cease on a certain known date.

"Q. And by that date, of course, it would be necessary to have the investment returned?

"A. That is right.

"Q. And in the meantime, those who made the investment would naturally expect to receive reasonable interest, if it were bonds, and reasonable dividends if it were stock?

\*A. I presume that would be the reason they would make the investment."

The Presiding Commissioner then interrupted to ask whether the investor should have his reasonable dividends from the beginning, to which question the witness answered that he was looking to the question only "from now on" (R. 343).

Then occurred the following further colloquy (R. 343):

"Q. (By Mr. Thelen): It would not be proper just to jump in at the middle and say 'Regardless of all the sacrifices that were made in the past, we won't pay them back to you but will simply take care of the future'; that would not be a fair proposition, would it, in the case of a wasting asset?

\*A. (By Mr. Coleman): In this particular wasting asset, or in general?

"Q. Any one.

- "A. Of course, in this particular one we had no voice in the matter until now, and that was the reason we were considering it from now on."
- The Railroad Commission made no finding as to amount to be allowed for either depreciation or depletion.

There is no support in the Commission's decision for the statement of the Supreme Court of California (96 Cal. Dec. 367, 380; R. 139) that "in computing the net annual receipts, allowances were made for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period." A most careful reading of the Commission's decision will fail to reveal any "computing of net annual receipts" under the tolls established by the Commission and no finding of any-number of dollars to be allowed for either depreciation or depletion for 1938 or any subsequent year.

Here, again, this Court and counsel are being asked to do the Commission's work.

The omission to make these essential and basic findings is all the more noteworthy because appellant presented complete evidence on the subject, extending throughout the entire term of appellant's franchises, from beginning to end.

- Under the Railroad Commission's tolls, appellant would be unable, in the sum of \$2,841,767.00, to meet its obligations to its bondholders and stockholders by the time its assets will have passed from its ownership.
- a. Situation at the hearing.

The Commission introduced Exhibit 22 (Coleman) entitled "Estimated Cash Requirements" (R. 285)

for the purpose of showing that appellant could suffer a substantial reduction in its revenues and still be able to pay principal and interest on its bonds and an 8 per cent dividend on its stock in the *future* and retire its stock at par by the time when appellant would lose its property in 1948.

The exhibit was a partial application of the "wasting asset" theory, based on the effect of reduced tolls on appellant's ability to meet its obligations to its bondholders and stockholders prior to the expiration of its franchises in 1948. As will shortly appear, appellant carried this inquiry to its correct, logical and complete conclusion.

Said Exhibit 22, however, ignored the fact that up to December 31, 1935, no dividends had ever been received by the stockholders and that the principal amount of these unpaid dividends at 8% amounts to \$2,404,600.00 (Coleman, R. 344; Haines, R. 461 468).

Mr. Coleman testified that ten years' dividends which were not received by the stockholders would amount at an 8% dividend rate to approximately \$2,-250,000.00 (R. 344).

Then occurred the following question and answer (R. 344):

"Q. (By Mr. Thelen): And, of course, if one takes the theory of a wasting asset and applies it logically from the beginning, instead of jumping into the middle of the period, those stockholders would have been taken care of as far as dividends are concerned?

"A. (By Mr. Coleman): That would be correct if you started from the beginning."

Exhibit 22 sets forth merely an "average year" without reference to the actual cash requirements of any particular year. This is a matter of considerable importance, for the reason that the Company must, each year, meet its cash requirements for that particular year. In this respect, the Company cannot rely on "averages" (Haines, R. 458).

The exhibit assumes that capital stock could be retired from property which is not cash and as to which serious doubts exist as to when it could be converted into cash and how much cash could be realized therefrom (Haines, R. 458-9; see also Haines, Exh. 126, Statement of Estimated Cash Requirements, Note 1, R. 460, 462-A).

The exhibit assumed the retirement of capital stock at \$1.00 per share, although a substantial portion of the outstanding stock, including all of that sold to several thousand stockholders in California, was sold at \$2.00 per share, netting the Company \$1.60 per share (Coleman, R. 345). To all of these people, a dividend of 8¢ per share means a return of only 4% on their investment.

Provision was made for the amortization of the bonds over a period of ten years, whereas it is necessary, under the bond mortgages, to pay off the same completely within approximately eight and one-half years. The significance of this item in Exhibit 22 appears from the fact that said exhibit allows for bond

interest and retirement, on the basis of an average for ten years, only the sum of \$421,498.00, whereas the actual amount required in 1938 and the next succeeding six years will be in excess of \$565,000.00 each year (Haines, R. 458; see also Haines, Exh. 126, Statement of Estimated Cash Requirements, Item "Debt Service" and Note, R. 460, 462-A).

Exhibit 22 spoke as of October 31, 1937. However, by December 31, 1937, the situation had already substantially changed so that the computations of Exhibit 22 could no longer be relied upon. The net current assets of the Company, after giving effect to a Federal tax accrual, were only \$20,000.00, as contrasted with the very much larger figure shown in Exhibit 22 (Haines, R. 465; see also Haines, Exh. 126, Statement of Cash Requirements, Note 2, R. 460, 462-A).

All of these matters and others were developed in cross-examination of Mr. Coleman (R. 342-345) and in direct examination of Mr. J. W. Haines, a partner in the firm of Haskins & Sells, who appeared as a witness for American Toll Bridge Company (R. 457-469; see also Haines, Exh. 126—Statement of Estimated Cash Requirements and Note thereto, R. 460, 462-A).

However, the presentation of Exhibit 22 may be assumed to evidence a realization by the witness of a responsibility in the case of a "wasting asset" different from and beyond that which exists in the usual case of a public utility whose franchises either extend over long periods or are without limit as to time.

On this subject, the following colloquy occurred between Mr. Coleman and Mr. Thelen (R. 344-345):

"Q. (By Mr. Thelen): This case is quite different; is it not, from the normal case of a public utility which has a franchise lasting a great many years or which is indeterminate in character?

"A. (By Mr. Coleman): Yes, sir, so far as

I know, it is the first one of this kind.

- "Q. First one the Commission has ever had, isn't it?
  - "A. So far as I know.
- "Q. In the case of the usual public utility which has an indeterminate franchise, or at least a long term franchise, if the dividends cannot be paid during the early years there is at least the hope that they can be made up later?

"A. That is right."

After Exhibit 22 had been presented, American Toll Bridge Company submitted, through Mr. Haines, Exhibit 126 (R. 460, 462-A), which is a statement, prepared with meticulous care and accuracy, showing the actual cash requirements, in each year from 1938 to June 30, 1948 in the event that American Toll Bridge Company should undertake to meet its obligations on principal and interest of its bonds, pay 8% dividends on its capital stock and retire the stock at par (i. e. \$1.00, not \$2.00 per share) by the time the Company's franchises will have expired.

In a subsequent supplemental exhibit (No. 136, R. 512, separately forwarded), Mr. Haines showed in great detail how all the computations in Exhibit 126 on the important subject of the various classes of

Federal taxes—capital stock, excess profits, normal income and undistributed profits—were made.

A comparison of the cash required, year by year, with Mr. Ready's estimates of the cash which would be available under a suggested 50¢ toll (Exh. 134, page 4, R. 506, 506-C) shows that the 50¢ toll would have failed, by a wide margin, to enable the Company to meet its obligations to its bondholders and its stockholders, even if the failure to pay any dividends whatever to its stockholders during the period from May 21, 1927 to December 31, 1935 be entirely disregarded.

#### b. Situation under tolls established by Commission.

We turn now to the situation under the tolls as actually established by the Commission.

Attached to this brief as Appendix No. 3, the Court will find a statement entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948—Under Rates as per C. R. C. Decision". We have prepared this exhibit for the purpose of ascertaining whether or not the tolls actually established by the Commission will really enable the Company to meet its obligations to its bondholders and its stockholders.

The exhibit and the sources of its figures are readily understood. The operating revenue figures are secured by applying to the traffic shown in Exhibit 134, page 4 (R. 505, 506-C), the new rate fixed by the Commission, assuming that a 10% stimulation in auto traffic will result from the lowering of the tolls. The items of "total direct and general expenses" and "state franchise and federal income tax" are readily.

ascertainable from said page 4 in Mr. Ready's Exhibit 134 by merely making the necessary adjustment for increased county, state and Federal taxes resulting from increased operating revenue. We assume that there will be no dispute with reference to any of these figures with the exception that, as bereinbefore pointed out, the Commission disagrees with us as to the particular year in which Federal income taxes shall be reported. We believe that our view in this matter is correct and that complete reliance may be placed on the attached Appendix No. 3.

The items for "bond interest and retirement" are the actual requirements under the Company's bond mortgage and are shown in Exhibit 126—Haines (R. 460, 462-A). The total number of shares of stock outstanding at the beginning of 1938 likewise appears in Mr. Haines' exhibit.

The remaining figures are easily understood. The money remaining at the end of each year, after the other obligations to bondholders and stockholders have been met, is simply used to retire capital stock at \$1.00 per share.

The exhibit shows that at the end of the franchise period in 1948, the revenues from the rates now fixed by the Commission will have failed to retire 437,167 shares of stock of the par value of \$1.00 per share.

The exhibit further shows that said revenues will have failed to apply as much as a single dollar on the \$2,404,600.00 of dividends at 8% which the Company failed to earn and declare during the period from May

21, 1927 to December 31, 1935. Said figure of \$2,404, 600.00 includes nothing whatever for interest.

Finally, the exhibit shows unretired capital stock at \$1.00 per share plus unpaid dividends, at the end of the franchise period, totaling \$2,841,767.00.

It thus appears that under the tolls now fixed by the Commission, the Company will fail by a very large sum to earn sufficient revenue to enable it to meet its obligations to its bondholders and stockholders.

5. Under the Railroad Commission's tolla, appellant would fail in the sum of \$2,663,766.00 to receive sufficient revenue to enable it to retire, by 1948, the money invested in its wasting assets, if a fair return throughout the term of the franchise is taken at 8 per cent, and in the sum of \$7,142,576.00 if such return is taken at 9 per cent.

We shall now give further consideration to the subject of "wasting assets" by approaching the matter from a somewhat different angle.

In this connection, we have in mind the general principle that a public utility which owns and operates a wasting asset is entitled to receive sufficient revenue to enable it, after paying the usual expenses of operation, maintenance, replacements and taxes, and receiving a fair return on such portion of its investment as, from year to year, has not as yet been paid back, to retire the entire investment by the time the asset is completely wasted. The funds thus received are sometimes referred to as moneys received to take care of the depletion of the wasting asset.

Leaving the question whether the rates fixed by the Railroad Commission will yield sufficient revenue to enable appellant to meet its obligations to its bond-holders and stockholders, we shall now consider appellant's ability, under said rates, to retire its investment in its bridges prior to the expiration of appellant's franchises in 1948.

Our figures will be the actual figures for the years 1926 to 1937, inclusive, at the tolls heretofore in effect, as reported by Mr. Ready without any challenge whatever, in his Exhibit 132, Table 3 (R. 491, separately forwarded) and the estimated figures for the years 1938 to 1948, inclusive, based on exhibits of Mr. Ready and shown in statement entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948—under Rates as per CRC Decision"—which statement is attached to this Brief as Appendix No. 3.

Our method will be as follows: From the gross revenue of each year we shall deduct the sum of the operating expenses and the Federal and State income taxes, thus ascertaining the amount remaining for fair return and for depletion of the investment. From said remainder, we shall then deduct a fair return at the rate of 9% on the amount of the investment remaining each year after the moneys available for retirement of investment have been deducted. The amount then remaining is the sum available for depletion or retirement of investment in that year.

This process will be followed, year by year, for each year from 1926 to 1948 (to the date of the expiration of the franchises), inclusive. We shall thus finally secure a figure which will be the amount of the unretired or undepleted investment in 1948. That figure

will be the amount by which the rates prescribed by the Railroad Commission will fail to have retired appellant's investment in its wasting assets by the date of the expiration of the franchises.

We shall then repeat the process, using, however, an 8% return in lieu of the 9% return to which we believe we have shown appellant to be entitled on the evidence in this case.

Attached to this Brief as Appendix No. 4, the Court will find the statement which we have thus prepared, entitled "Wasting Assets — American Toll Bridge Company—Effect of Rates prescribed by Railroad Commission on Company's ability to Retire the Investment".

With the exception of mere mathematical computations, the figures are all as testified to by Mr. Ready. With the exception of the question in which year Federal income taxes as actually paid shall be shown, to which matter we have hereinbefore referred, we understand that the figures are unchallenged.

As already stated, the figures for the years 1926 to 1937, inclusive, are the actual figures under the tolls heretofore in effect and the figures for the year 1938 to 1948, inclusive, are the estimated figures under the lower tolls established by the Commission.

To facilitate the Court's examination of the statement, we submit the following statement of the make up of its various columns:

Column 1-Gross Revenue-

Exh. 132, Table 3, col. 2 for 1926 to 1937, incl., and Appendix No. 3 to this brief for 1938 to 1948, incl.

Column 2—Operating Expenses—

Exh. 132, Table 3, col. 3 for 1926 to 1937, incl., and Appendix No. 3 to this brief for 1938 to 1948, incl.

Column 3—Federal and State Income Taxes— Exh. 132, Table 3, Col. 4 for 1926 to 1937 incl., and Appendix No. 3 to this brief for 1938 to 1948, incl.

Column 4—Total Operating Expenses plus Taxes. Col. 2 plus col. 3.

Col. 1 minus col. 4.

Column 6—Investment—average amount— Exh. 132, Table 3, col. 1 for 1926 to 1948, incl.

Column 7-Investment less Depletion.

Col. 6 minus col. 10, except that no addition is made where the figures in col. 10 are "red", it being assumed that the wasting asset formula will retire early deficits without interest thereon.

Column 8-9% Return on Depleted Investment-

Return computed on col. 7 each year except that in 1927 it is computed on only such portion of investment as was actually in service and that in 1948 it is computed on only that portion of year up to the expiration of franchise as to each bridge.

Column 9—Amount available for Depletion of Investment, separately for each year—

Col. 5 minus col. 8.

Column 10—Amount available for Depletion of Investment, progressively accumulated, year by year—From col. 9.

Columns 11, 12, 13 and 14 have been prepared on the assumption of a fair return of 8% per annum, in lieu of the 9% used in the preceding portion of the statement. These columns are the counterpart of columns 7, 8, 9 and 10, respectively.

By looking at the last figure in column 7, the Court will observe that, after making appropriate allowances for operating expenses, Federal and State income taxes and a return of 9 per cent per annum on the unretired portion of the investment, year by year, the tolls in effect prior to 1938 plus those established by the Commission for the remaining years, will have failed to supply \$7,142,576.00 of the fundamecessary to retire the investment by 1948.

Likewise, by looking at the last figure of column 11, the Court will observe that with a return of 8 per cent per annum, said tolls will have failed to supply \$2,663,766.00 of the funds necessary to retire the investment by 1948.

We submit that nothing further is necessary to demonstrate the utter failure of the tolls fixed by the Railroad Commission to yield the revenues to which appellant is rightfully entitled so as to retire the investment in its wasting assets by the time the franchises expire in 1948.

6. Under the law of wasting assets, the colls established by the Railroad Commission will confiscate appellant's property in its Carquines and Antioch Bridges.

Bearing in mind the actual situation as we have developed it, and also Justice Cardozo's declaration in Columbus Gas & Fuel Company v. Public Utilities Commission, supra, that failure to make a proper allowance to a public utility for the depletion of its wasting assets "is to take its property away from it without due process of law", we respectfully submit that the Railroad Commission's decision constitutes a clear case of denial of due process of law.

This point is in addition to and independent of each of the other points hereinbefore submitted.

#### D. CONCLUSION ON DENIAL OF DUE PROCESS—CONFISCATION.

We believe that we could well rest our case on either impairment of contract obligations or denial of procedural due process of law.

However, out of an abundance of caution, we have gone further and have tried, to the best of our ability, to set forth the facts in the record bearing on the additional issue of confiscation. We believe that we have shown—

- 1. Viewing the Carquinez Bridge separately, the Commission's order confiscated appellant's property in that bridge;
- 2. Turning then to appellant's unified transportation system, consisting of both the Carquinez and the Antioch Bridges, we have shown that the Commission's order failed to give a fair re-

turn on the fair value of the property and, accordingly, is confiscatory; and

3. Under the law of wasting assets, the revenue

from the rates established by the Railroad Commission will be (a) inadequate to enable appelled to meet its obligations to its bondholders and is stockholders and (b) inadequate to enable appellant to retire its investment by the date of the expiration of its franchises in 1948.

For each of these reasons, the Commission's orders is confiscatory.

#### CONCLUSION.

For each of the reasons hereinbefore in this Briestated, we respectfully submit that the judgment of the Supreme Court of California should be reversed.

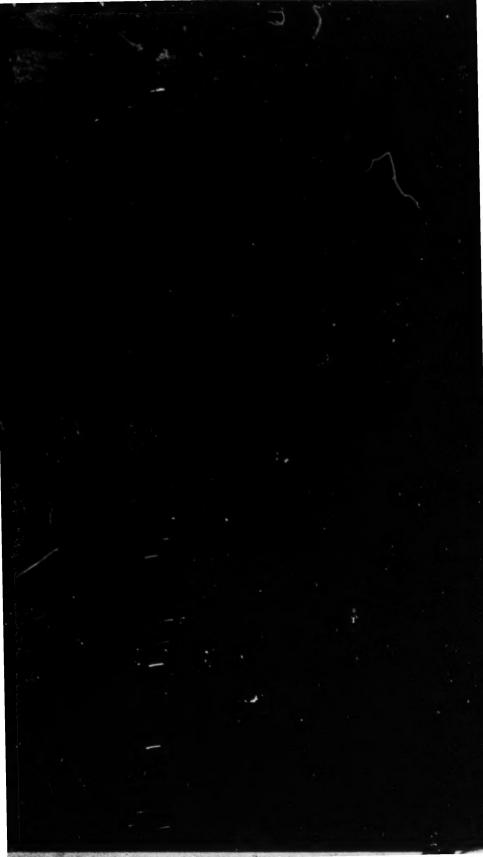
Dated at San Francisco, California, this 7th da of-April, 1939.

Respectfully submitted,

MAX THELEN,

Counsel for Appellant.







ORDINANCE NO. 171.

an Ordinance Granting the Application of Rodeo-Vallejo Ferry Company, a Corporation, and Franchise to Erect, Construct and Maintain a Toll Bridge Across the Straits of Carquinez Between the County of Contra Costa and the County of Solano, State of California, and Take Tolls Thereon.

Before the Board of Supervisors of the County of Contra Costa, State of California.

In the matter of the application of Rodeo-Vallejo Ferry Company, a corporation, for authority to erect, construct and maintain a toll bridge and take tolls thereon across the Straits of Carquinez between Contra Costa County and Solano County, California.

The Board of Supervisors of the county of Contra Costa, State of California, do ordain as follows:

That the Rodeo-Vallejo Ferry Company, a corporation organized and existing under and by virtue of
the laws of the State of California, and having its
principal place of business in the town of Rodeo,
county of Contra Costa, State of California, having
made its duly verified application in writing in due
form of law to the Board of Supervisors of the county
of Contra Costa for authority to erect, construct and
maintain a toll bridge with the right, privilege and
permission to take tolls thereon across the Straits of
Carquinez between the county of Contra Costa and the
county of Solano, in the State of California, as de-

scribed in the application of Rodeo-Vallejo Ferry Company, a corporation, therefor.

AND WHEREAS, the county of Contra Costa is the county on the left bank descending of the Straits of Carquinez the body of water or stream across which it is proposed to erect, construct and maintain said bridge, and

WHEREAS, this Board has jurisdiction to hear and act upon said application, and whereas the Board of Supervisors of the county of Contra Costa, on the 6th day of November, 1922, proceeded to hear and did hear the application of said Rodeo-Vallejo Ferry Company, a corporation, and continued the further hearing thereon from time to time to and until the 8th day of January, 1923, and said Board of Supervisors on the said 8th day of January, 1923, all members thereof being present, duly passed and adopted a resolution expressing its desire to grant the privilege permission and franchise to the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns to erect, construct and maintain a toll bridge across the Straits of Carquinez between the county of Contra Costa and the county of Solano in the State of California, and having found and determined therein the precise point where such bridge is proposed to be located in the manner prescribed by law, and this Honorable Board having thereupon notified W. F. McClure, State Engineer of the State of California, of such purpose and the precise point where such bridge is proposed to be located, and duly and regularly continued the further hearing of said application and the

hearing thereon to this 5th day of February, 1923, and said Engineer having in accordance with law designated the length of the spans necessary to permit the free flow of water in said Straits of Carquinez, there being no draw in said bridge, and having filed in writing his designation as aforesaid, with the Board of Supervisors in pursuance of law on this 5th day of February, 1923.

And now on this 5th day of February, 1923, it fully appearing to the satisfaction of this Board that due proof has been made that due and legal notice of said application of said Rodeo-Vallejo Ferry Company, a corporation, for the right and franchise to so erect, construct and maintain a toll bridge across said Straits and to take tolls thereon and the time and place fixed for the hearing thereof and thereon has been made and given in all things in the manner and for the time prescribed by law, and this Board having in open and regular session duly considered said application for such franchise and permission to take tolls thereon, now determines and finds that the application of said Rodeo-Vallejo Ferry Company, a corporation, is in all things as required by law, and that due and legal notice of said application has been given in the manner prescribed by law and that this Board has jurisdiction to hear and act upon said application and grant said franchise.

That said toll bridge across said Straits prayed for in said application of said Rodeo-Vallejo Ferry Company, a corporation, between the points and at the location determined by this and, is a public necessity.

That the expense of the erection, construction and maintenance of such a toll bridge as a free public highway is in the opinion of this Board and this Board so determines and finds too great to justify the erection, construction, and maintenance thereof by the counties of Contra Costa and Solano.

That said bridge is a public necessity. That in the opinion of the Board, the public good and interests require the construction of said bridge. That the public good and public necessity will be promoted by the erection, construction and maintenance of said bridge as proposed by the said Rodeo-Vallejo Ferry Company, a corporation.

That said Rodeo-Vallejo Ferry Company, is the owner of lands in Contra Costa County, California, hereinafter particularly described upon which the southern terminal of said bridge is to be located.

That the bridge as proposed to be erected by the Rodeo-Vallejo Ferry Company, a corporation, is of such type that it will not interfere with or obstruct navigation and will allow sufficient space or span to permit the safe, expeditious and convenient passage at all times of all vessels which may navigate said Straits.

That there is no toll bridge at the proposed location nor is there any bridge whatever across said Straits.

That there is no ferry operating across said Straits of Carquinez within a mile of the site of the proposed bridge, save and except that of said Rodeo-Vallejo Ferry Company, a corporation.

THEREUPON, it is by the Board of Supervisors of the County of Contra Costa, State of California, ordered, that said bridge is a public necessity; that the public good and interests require the construction thereof; that the public good and interest and public necessity will be promoted by the erection, construction and maintenance of said bridge.

That said bridge is to be erected, constructed and maintained in a straight line across the Straits of Carquinez, between the County of Contra Costa and the County of Solano, State of California, between the terminal points or locations hereinafter described.

That the application of the Rodeo-Vallejo Ferry Company, a corporation, is hereby granted, and that the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns is hereby granted the right, privilege, permission, authority and franchise to erect, construct and maintain a toll bridge with the right to take tolls thereon across the Straits of Carquinez between the County of Contra Costa and the County of Solano, State of California, in a straight line between the terminal points hereinafter particularly described, with the proper approaches thereto, for the term of twenty-five (25) years from and after the effective date of the ordinance granting said franchise.

It is hereby ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the Counties of Contra Costa and Solano.

Said Bridge to be constructed of concrete and steel and is to be of the suspension type or such other type as the War Department of the United States in its judgment may prescribe. It shall be of a height of one hundred thirty-five (135) feet in the clear above mean high water on said Straits, at all points between the southerly proposed new pierhead line as hereinafter described and the next pier north of said line. The breadth of the roadway of the said bridge shall be not less than thirty (30) feet. Said bridge shall be constructed in all things in accordance with the requirements of the United States War Department. No pier of said bridge nor any portion thereof nor any other obstruction below said 135 feet clearance shall be placed in the Straits of Carquinez between a straight line drawn from the northwest corner of the California & Hawaiian Sugar Refining Corporation's wharf and the northeast corner of Selby wharf (said line being the proposed new pierhead line to be established by the proper authorities of the United States) and a point one thousand (1000) feet northerly from said line.

That the location of the Contra Costa County terminal of said bridge is as follows:—

Portion of Location No. 229, State Tide Lands, Contra Costa County, lying within the southeast quarter of Section 31, Township 3 North, Range 3 West, M. D. B. & M., and more particularly described as follows, to-wit:

Beginning at a point on the southerly side of the Straits of Carquinez 14.36 chains north of the Southeast corner of Section 31, Township 3 north, range 3 west, Mount Diablo Meridian in the line of extreme low; thence south 5.07 chains to a station in the United States Bulkhead line; thence north 89° 17′ west running along said bulkhead line 5.57 chains to station; thence north 4.70 chains to station in low water line; thence north 87° east 5.58 chains into the place of beginning run by the true meridian, magnetic variation 17° 05′ east, containing 2.71 acres.

Also on that certain roadway situate in said county and state aforesaid and more particularly described as follows, to-wit:

Commencing at a point where the center line of First Avenue, Town of Valona, Contra Costa County, intersects the southerly shore of Carquinez Straits in southerly line of tideland survey No. 44, C. C. Co.; thence northerly 760 feet more or less crossing the lands of the Northern Railway Co. and lands formerly owned by Mrs. Muir and the State of California to the line of the tract of 2.71 acres above described. The above described line is the center line of a 40 foot roadway.

That the location of the Solano County Terminal of said bridge is as follows:

On that certain tract of land situated, lying and being in the county of Solano, State of California, and known as the James Clyne Tract, located in the north half of Section 32 and the south half of Section 29, in Township 3 North, Range 3 West, M. D. B. & M., which said tract of land lies between the lands of the Pinole Dome Oil Company on the east and the lands of Antonio dos Reis and the lands of the Great Western Power Company on the west, and more particularly described as follows, to-wit:

Beginning at the point of intersection of the line of mean high water on the north shore of Carquinez Straits with the westerly line of the James Clyne Tract in Section 32, Township 3 North, Range 3 West, M. D. B. & M. (if the public land surveys of the United States be considered extended over said land), and running thence northerly along said westerly line of the James Clyne Tract, 600 feet to a point on said line; thence east 350 feet; thence north 550 feet more or less to said line of mean high water on the north shore of Carquinez Straits; and thence westerly along said line of mean high water to the point of beginning.

The precise point on the above described locations where such bridge is to be located is as indicated on sheet 2 accompanying report of W. F. McClure, State Engineer of the State of California, and dated February 1, 1923, and filed with the Board of Supervisors of Contra Costa County on the 5th day of February, 1923, reference to which is hereby made as a part hereof, and is particularly described as follows, towit:

The bridge axis or center line is fixed by a straightline passing through the two following points:

- 1. Point P, which is the intersection of the bridge axis with the property line between James Clyne and the Great Western Power Company on the Solano shore. This point P is 410 feet from a point marked Q and measured along the boundary between the James Clyne property and that of the Great Western Power Company. This line bears south 32° west. The Point Q is the intersection corner common to the properties of James Clyne, the Great Western Power Company and Manuel and Antonio dos Reis.
- 2. Point R, shown on Sheet No. 2, on the Contra Costa side along the front property line of the Rodeo-Vallejo Ferry Company, which line bears north 87° east. The point R is 120 feet westerly along this line from the northeast corner of the Rodeo-Vallejo Ferry Company's property location No. 229, 2.71 acres. This northeast corner of the Ferry Company's property is 14.36 chains north of the intersection point common to Sections 5, 6, 31 and 32.

That a penal bond be given by the Rodeo-Vallejo Ferry Company, a corporation, for the benefit of the county and all persons crossing or desiring to cross said bridge, in the sum of Twenty-five thousand (25,000) dollars, conditioned as required by law, said bond to be given at least ten days before the operation of said bridge and the taking of tolls thereon.

That the Rodeo-Vallejo Ferry Company, a corporation, give bond to the County of Contra Costa in the sum of Fifty thousand (50,000) dollars guaranteeing the faithful performance of all the terms and

provisions of the ordinance granting franchise herein, said bond to be given within thirty days after the ordinance granting this franchise becomes effective, said bond not to be effective until after approval of said bridge and franchise by the War Department of the United States.

That the license tax to be paid by the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns, for taking tolls on said bridge shall be One hundred (100) dollars per month payable annually, commencing from date of the operation of the said bridge. That two (2%) per cent of the gross receipts derived from the use and operation of said bridge shall also and in addition be paid to the County of Contra Costa for the benefit of the counties of Contra Costa and Solano for the use of said franchise.

The actual construction of said bridge in good faith, shall be started within four months from the date of this Ordinance granting said franchise and shall be completed within three years thereafter, or such further time as may be granted by the Board of Supervisors.

It is further ordered that the rate of tolls which may be collected for crossing said bridge shall be as fixed by the Railroad Commission of the State of California, and that in the event said Railroad Commission shall fail to fix such tolls then it is hereby further ordered that the rate of tolls which may be collected for crossing said bridge shall be as follows:

## Automobiles

	Rate
Ambulance, self-propelled or horse-drawn	\$0.75
Automobiles	.75
Automobile passenger busses	1.50
Bicycles	
Bicycle accompanied by owner. Each	.25
Carts and Wagons	
Cart or wagon without horse	75
Push carts (attendant and freight extra). Each	.25
Commercial or Delivery Automobiles	
and Motor Trucks	
Not exceeding 2 tons capacity. Each	1.00
Exceeding 2 tons capacity. Each	1.50
Ditchers, Harvesters, etc.	
Ditchers, harvesters, steam rollers, tractors and all similar conveyances, machines and vehicles	
charged on a basis of weight, per ton of 2,000 pounds, at carrier's convenience. Ton	1.60
Cattle and Stock	
Cattle per head and stock in herds and uncrated,	
including one attendant. Each	.50
Sheep and swine uncrated and in herds, includ-	
ing one attendant. Each	.35
Commutation Rates	*
Motor stages operated daily over a fixed route	
(minimum charge per day \$10.00 per trip,	
includes driver but no passengers)	.50
Daily round trip for automobiles and driver,	,
per month	25.00

Freight
Freight of all kinds on vehicles per 1,000 lbs.
(minimum charge 20 cents)
Hearses
Hearses, self-propelled or horse-drawn (with or
without casket and corpse)
Horses
Horse and wagon or cart, or pleasure vehicle
Two horses and wagon, or pleasure vehicle
Two horses and dray, or truck or commercial vehicle
One horse or draft animal, not attached to ve-
hicle. Each
Each horse over two attached to vehicle. Each
Motorcycles
Motorcycles. Each
Motorcycles with side car. Each
Trailers
Two-wheel trailers attached to automobiles
Four-wheel trailers attached to automobiles or
trucks (camping equipment in trailers charged as freight)
Passengers
Passengers, drivers of vehicles and pedestrians, one way
Passengers, drivers of vehicles and pedestrians, round trip

#### Commutation Rates

Passengers, drivers of vehicles and pedestrians, per month 3.00

Said bridge shall be constructed in accordance with the requirements of the United States War Department.

It is further ordered that this ordinance be published before the expiration of fifteen days after the passage thereof, together with the names of the members of the Board voting for and against the same for at least one week in the Contra Costa Gazette, a newspaper printed and published in the County of Contra Costa.

This ordinance shall become effective thirty days from and after its passage.

The foregoing ordinance was adopted this 5th day of February, 1923, by the following vote:

Ayes-Supervisors, Zeb Knott, C. H. Hayden, W.

J. Buchanan and R. J. Trambath.

Noes-Supervisors, none.

Absent-Supervisors, J. P. Casey.

W. J. BUCHANAN,

Chairman of the Board of Supervisors of the County of Contra Costa.

Attest:

J. H. WELLS,

Clerk of Board of Supervisors.

(Seal of Board)

An act to amend section 2 of the Public Utilities Act, relating to the definition of public utilities, and definitions of other terms used in said act, and including and defining toll bridges and toll bridge corporations as public utilities.

(Approved by the Governor, July 1, 1937. In effect August 27, 1937.)

The people of the State of California do enact as follows:

Section 1. Section 2 of the Public Utilities Act is hereby amended to read as follows:

"SEC. 2. \* \* \*

"(dd) The term 'public utility,' when used in this act, includes every common carrier, toll bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.

"(ee) The term 'toll-bridge corporation,' when used in this act, includes every private corporation or private person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any bridge or appurtenance thereto, used for the transportation of persons or property for compensation in this State."

# AMERICA U

	1938	1939	5 1940
1. Operating Revenue	\$1,250,339	\$1,270,256	\$1,290,173
2. Total Direct & General Expenses	284,584	284,983	285,711
3. State Franchise & Federal Inc. Tax	114,548	45,129	51,198
4. TOTAL:	399,132	330,112	336,909
5. NET:	851,207;	940,144	953,264
6. Bond Interest	88,431	162,550	144,833
7. Bond Retirement	. 245,167	406,663	420,417
Total:	.333,598 .	569,213	565,250
8. Balance for Div. & Stock Retirements	517,609	370,931	388,014
9. Dividend @ 8% on Par Value of		*	
Stock less Refunds	302,150	284,913	278,032
10. Stock, Beginning of Year	3,776,873	3.561,414	3,475,396.
11. Stock, Retired	215,459	86,018	109,982
12. Dividends @ 8% per annum for			
Period June 1, 1927 to Dec. 31,			
1935 (without Interest on Same) Exh. 126	,	•	•

13. Unretired Stock plus Unpaid Dividends as of End of Franchises.....

# ESTIMATED OPERATING RESULTS IERICAN TOLL BRIDGE COMPANY—1938-1948

Under Rates as per CRC Decision

1940	1941	1949 1943	1944	1945	1946	1947	1948 .	Total
1,290,173	\$1,312,083	\$1,335,983 \$1,357,892	\$1,379,801-	\$1,401,709	\$1,423,618	\$1,445,527°	\$210,067	\$13,677,448
285,711	286,149	282,827 268,196	288,634	269,072	269,840	270,278	58,185	2,828,459
51,198	57,698	69,123 80,645	98,762	115,652	131,219	140,529	148,135	1,952,638
336,909	343;847.	351,950 348,841	367,396	384,724	401,059 .	410,807	206,320	3,881,097
953,264	968,236	984,033 1,009,051	1.012,405	1,016,985	1,022,559	1,034,720	3,747	9,796,351
144,833	122,260	98,198 72,715	45,902	17,325 .	- /	1 " .	1 2	752,214
420,417	448,125	474,708 499,375	519,583	315,000	· · · ·			3,329,038
565,250	570,385	572,906 572,090	565,485	332,325	· -			4,081,252
388,014	397,851	411,127 436,961	446,920	684,660	1,022,559	1,034,720	3,747	5,715,099
7.71			**			/	1.11	
278,032	269,233	258,944 246,769	231,554	214,324	176,698	109,029	4. 5	2,371,646
3,475,396	3,365,414	3,236,796 3,084,613	2,894,421	2,679,055	2,208,719	1,362,858	437,167	437,167
109,982	128,618	152,183 . 190,192	215,366	470,336	845,861	925,691		3,339,706
			, ,				**	

2,404,600

2,841,767

WASTING ASSETS—AMERICAN TOLL BRIDGE COMPANY

Effect of Rates Prescribed by Railroad Commission on Company's Ability to Retire the Investment

		1			,*	4)		9% B	ASIS			8%	BASIS	
**	Gross	Operating	Pederal and State	Expenses Plus	Net For Beturn	Investment " Average	Investment Less	9% Return on Depleted		vailable for f Investment	Investment	8% Return		Available for of Investment
Year	Revenue	Expenses	Income Taxes	Taxes	& Depletion	Amount	Depletion	Investment	For Year	Accumulated'	Less Depletion	on Depleted Investment	For Year	Accumulate
0 .	• (1)	(2)	(3)	(4)	° (5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
1926	\$ 92,334	\$ 61,981	\$ 2,455	<b>*</b> 64,436	\$ 27,898	\$1,542,941	\$1,542,941	\$138,865	\$110,967*	\$110,967*	\$1,542,941	\$123,435	\$ 95,537*	\$- 95,537
1927	734,861	227,222	5,647	232,869	501,992	8,751,923	8,751,923	521,185	19,193*	130,160*	8,751,923	463,276	38,716	56,821
1928	1,122,715	363,754	_	363,754	758,961	9,074,486	9,074,486	816,704	57,743*	187,903*	9,074,486	725,959	33,002	23,819
1929	1,252,073	339,666	2 2 200	339,666	912,407	9,260,783	9,260,783	833,470	78,937	108 966*	9,260,783	740,863	171,544	147,725
1930	1,369,050	316,566	9,470	326,036	1,043,014	9,498,583	9,498,583	854,872	188,142	79,176	9,350,858	748,069	294,945	442,670
1931	1,316,396	332,757	30,774	363,531	952,865	9,675,372	9,596,196	863,657	89,208	168,384	9,232,702	738,616	214,249	656,919
1932 -	1,105,170	307,567	14,295	321,862	783,308	9,691,565	9,523,181	857,086	73,778*	94,606	9,034,646	722,772	60,536	717,455
1933	1,023,907	295,103	9,789	304,892	719,015	9,688,535	9,593,929	863,453	144,438	49,832*	8,971,080	717,686	1,329	- 718,78
1934	1,074,171	264,079	1,057	265,136	809.035	9,683,996	9,683,996	871,560	62,525*	112,357*	8,965,212	717,217	91,818	810,602
1935	1,176,194	319,865	10,235	330,100	846,094	9,683,667	9,683,667	871,530	25,436*	137,793*	8,873,065	709,845	136,249	946,85
1936	1,441,230	272,848	13,689	286,537	1,154,693	9,685,877	9,685,877	871,730	282,963	145,170	8,739,026	699,122	455,571	1,402,42
1937	1,678,174	375,177	66,223	441,400	1,236,774	9,688,895	9,543,725	858,935	377,839	523,009	8,286,473	662,918	573,856	1,976,278
1938	1,250,339	284,584	114,548	399,132	851,207	9,688,895	9,165,886	824,930	26,277	549,286	7,712,617	617,009	234,198	2,210,470
1939	1,270,256	284,983	45,129	330,112	940,144	9,688,895	9,139,609	822,565	117,579	666,865	7,478,419	598,274	341,870	2,552,340
1940	1,290,173	285,711	51,198	336,909	953,264	9,688,895	9,022,030	811,983	141,281	808,146	7,136,549	570,924	· 382,340	2,934,686
1941	1,312,083	286,149	57,698	343,847	968,236	9,688,895	8,880,749	799,267	168,969	977,115	6,754,209	540,337	427,899	3,362,588
1942	1,335,983	282,827	69,123	351,950	984,033	9,688,895	8,711,780	784.060	199,973	1,177,088	6,326,310	506,105	477,928	3,840,513
1943	1,357,892	268,196	80,645	348,841	1,009,051	9,688,895	8,511,807	766,063	242,988	1,420,076	5,848,382	467,870	541,181	4,381,694
1944	1,379,801	268,634	98,762	367,396	1,012,405	9,688,895	8,268,819	744,194	268,211	1,683,287	5,307,201	424,576	587,829	4,969,52
1945	1,401,709	269,072	115,652	384,724	. 1,016,985	9,688,895	8,000,608	720,055	296,930	1,985,217	4,719,372	377,550	639,435	5,608,95
1946	1,423,618	269,840	131,219	401,059	1,022,559	9,688,895	7,703,678	693,331	329,228	2,314,445	4,079,937	326,395	696,164	6,305,125
1947	1,445,527	270,278	140,529	410,807	1,034,720	9,688,895	7,374,450	663,701	371,019	2,685,464	3,383,773	270,702	764,018	7,069,140
17.4	210,067	58,185	148,135	206,320	3,747	9,688,895	7,003,431	142,892	139,145°	2,546,319	2,619,755	47,758	44,011*	7,025,129

<sup>\*</sup> Denotes red figure.

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ard prescribed by the Legislature of California for application to toll-bridge companies.	27

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	Exclusion of the Intioch Bridge. The procedure of the Rail and Commission constituted a denial of due process of law because the Commission unfairly, unjustly, and arbitrarily severed the Antioch Bridge from appellant's single, unified transportation system and fixed tolls for the Carquinez Bridge alone, notwithstanding the fact that the record shows, without dispute, that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by force of competition between the two bridges, compel appellant to make like reductions in the tolls charged on the Antioch Bridge, a losing venture, thus accomplishing by indirection a result which the Railroad Commission could not accomplish directly.
Å.	The Railroad Commission's order confiscated appellant's property in the Carquinez Bridge because it failed to accord a fair return on fair value
	The Railroad Commission's order confiscated appellant's property in both the Carquinez and the Antioch Bridges because it failed to accord a fair return on fair value
Ċ.	The Railroad Commission's order confiscated appellant's property in both bridges, for the further reason that it failed to recognize and give effect to the rights of appellant in its wasting assets, namely, the Carquinez and Antioch Bridges, the title to both of which toll bridges will pass to the adjacent counties on the expiration in 1948 of the franchises granted by said counties for the construction and operation of said two bridges.

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#### IN THE

## Supreme Court of the United States

OCTOBER TERM, 1938.

No. 704.

AMERICAN TOLL BRIDGE COMPANY, a Corporation, Appellant,

V.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RIEEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California, Appellees.

#### REPLY BRIEF OF APPELLANT.

This reply brief is being filed in accordance with the provisions of Rule 27 (5) of the Revised Rules of this Court.

We shall consider the issues in the order in which we stated them in our opening brief and shall reply to the brief for appellees in connection with each such issue.

Unless otherwise specified, italics herein are ours.

#### IMPAIRMENT OF CONTRACT OBLIGATIONS.

In our opening brief, we showed-

- (1) That the Carquinez Bridge was constructed and is being operated under the provisions of Ordinance No. 171 of the board of supervisors of Contra Costa County, California;
- (2) That said ordinance is a contract between the State of California, acting through said board of supervisors, and appellant (County of Contra Costa v. American Toll Bridge Company, 10 Cal. (2d) 359);
- (3) That there are read into said contract as a part thereof, the applicable provisions of the Political Code of California relating to grants of franchises for the construction and operation of toll bridges, including particularly Sections 2845 and 2846 of said Political Code; and
- (4) That appellant and appellees have agreed as to the meaning of the language of said last-mentioned sections.

In the words of our opponents, with which we have heretofore announced agreement (R. 150-1):

"It may be conceded that the intent of section 2845(3), when read together with section 2846, and in the light of the earlier statutes, is that the boards of supervisors should not at any time during the life of the franchise \* \* \* so reduce the tolls as to fail to yield the grantee a return of 15 per cent on the cost of construction or or some other value ation of the property exclusive of the franchise itself."

This does not mean that appellant is at any time entitled to increase the existing tolls so as to increase the net income to 15 per cent. But the parties are agreed that the words of said Sections 2845 and 2846 mean that the board of supervisors may not at any time reduce the existing tolls unless the board has first found that the return is exceeding 15 per cent.

Accordingly, the following question arises-

Are the words of said Sections 2845 and 2846, when read into the contract, the words of contract or are they the words of regulation?

If they are the words of contract, as we believe them to be, then appellant's contract has been unlawfully impaired.

On the other hand, if, as contended by appellees, they are words of regulation, then they constitute the unrepealed and presently effective rule or standard of ratemaking prescribed by the Legislature for application. to the rates of toll bridge companies. In that event, it was the duty of the Railroad Commission to apply said words in the present case, and the Commission's failure to do so denied to appellant precedural due process of law.

In either event, the judgment herein must be reversed.

We shall now make specific reply to the points set forth in the brief for appellees on the issue of impairment of contract obligations.

#### 1. Preliminary Errors of Appellees.

At the very outset, appellees commit an inexplicable error. They say (Brief, p. 6):

"But let it be made entirely clear that it is not such franchise itself which appellant asserts to constitute a rate contract."

The same error is subsequently repeated (Brief, p. 27):

"\* \* \* for appellant does not contend that the franchise itself purports to be or constitutes the alleged contract."

We thought that we had made it abundantly clear that the contract on which we rely is the contract evidenced by the franchise ordinance (No. 171) into which are read and become a part thereof the applicable protions of the Political Code relating to grants of toll bridge franchises, including particularly the provisions of said Sections 2845 and 846. We do not understand the error of appellees in this respect.

Continuing, appellees say (Brief, p. 6):

"That franchise (R. 269-277), it is true, did mention the rates to be charged, but the franchise also declared that the Railroad Commission should fix the rates."

As we pointed out in our opening brief (p. 24):

"In connection with the rate of tolls, the ordinance provided that the same should be fixed by the Railroad Commission but that in the event that the Railroad Commission failed to do so, the tolls to be collected should be those set forth in detail in the ordinance. The Railroad Commission did not fix the tolls. The provision for such action by the Railroad Commission was obviously void for the reason that the Board of Supervisors and the grantee of the franchise could not, by any agreement between themselves, confer upon the Railroad Commission a jurisdiction which it did not have. The Legislature had (a) conferred that

jurisdiction upon the Board of Supervisors and (b) failed to confer it upon the Railroad Commission. For both of these reasons, said franchise provision was void."

The Railroad Commission has itself continuously taken the position that the above provision of the franchise ordinance was and is void. In fact, in its decision (R. 32-3) the Commission states that the jurisdiction claimed by it was acquired by the Act of July 1, 1937, effective August 27, 1937 (see Opening Brief, Appendix No. 2).

Why the matter should be referred to now is not ap-

parent to us.

Appellees next say (Brief, p. 7) that the particular contract rights on which appellant relies are claimed by appellant to exist throughout the franchise period of 25 years. This statement is likewise an error. The period during which the contract limitation on which appellant relies will remain. effective is only 20 years (Political Code, Section 2846) and will expire on or about March 5, 1943. As a matter of fact, bearing in mind that while the effective date of Ordiance No. 171 was March 5, 1923, the time when appellant could begin to charge the tolls specified therein did not commence until the Carquinez Bridge was opened for traffic on May 21, 1927, the effective period of the contract right claimed by appellant was only approximately 16 years. We do not believe that any one can fairly urge that this is an unreasonable period of time.

On page 8 of their brief, appellees say that said Sections 2845 and 2846 of the Political Code "remained unchanged since the time of the adoption of the Codes in 1872." In the interest of accuracy and to avoid the possibility that some member of the Court might unwittingly be misled by said statement, we point out

that while said statement is accurate as to Section 2846, it is inaccurate as to Section 2845. That section was amended, in relatively minor respects, in 1923, subsequent to the effective date of appellant's Carquinez and Antioch Bridge franchises (St. 1923, p. 288).

To us, the significant fact in connection with said amendment is that when reviewing the matter as late as 1923, only 16 years ago, the Legislature retained the 15 per cent provision on which we rely.

2. The Intent of the Legislature to Authorize and to Grant
- Contract Rights Appears from the Legislative History
of Toll Bridge Construction and Operation in California.

On pages 30 to 39 of our opening brief, we traced the history of the legislative regulation of toll bridge construction and operation in California from 1850 to the enactment of the Codes in 1872. We there showed the evolution of legislative regulation through three stages, beginning with regulation without any limitation in the fixing of tolls and finally evolving into definite contract limitation on the regulatory authorities, so as to give definite contract protection to the grantees of toll bridge franchises.

We there showed that Sections 2845 and 2846 of the Political Code are merely a recognition of the evolution of toll bridge franchise regulation from the earlier unlimited right of the boards of supervisors to fix such tolls as they might please to the later limitation of such right by appropriate contract protection accorded to the grantees of the franchises.

We are pleased to note that appellees (Brief, pp. 10-12) quote the language on which we rely from a number of the statutes enacted during the last of the said three stages. In so quoting, appellees apparently con-

cede that during said third stage, just prior to the enactment of the Codes in 1872, the Legislature did accord to the grantees of toll bridge franchises substantial protection in the form of contract limitation on the authority to regulate the tolls. The point of appellees seems to be that the details of that contract protection were changed in 1872.

Appellees seem to contend that the contract protection prior to 1872 was a guaranty of a specified minimum return on a specified rate base but that when Sections 2845 and 2846 of the Political Code were enacted in 1872, that protection was changed to read that the grantees of toll bridge franchises might retain the revenues from the tolls originally written into the franchise ordinance unless and until the net income might exceed 15 per cent on the designated rate base.

But this is a mere change in the details of the contract protection accorded and not a change in the general policy of giving protection to the grantees of toll bridge franchises by a definite contract limitation on

the power of regulation.

However, even the protection accorded in 1872 embodies the right to a certain minimum, namely, the right to retain the revenues from the tolls first inserted into the franchise ordinance unless and until those tolls should thereafter yield a return in excess of a maximum of 15 per cent. In that event, the rights of the public step in and are protected by the provision that the board of supervisors may reduce the tolls so that the net income shall not exceed 15 per cent.

There is thus a clear continuation of the definite policy of contract protection by the establishment of a contract limitation or the continuing power of regu-

lation.

In Los Angeles v. Los Angeles City Water Company, 177 U. S. 558, there was a quite analogous provision that the city council reserved the right to regulate the water rates subject, however, to the proviso

"that they shall not so reduce such water rates, or so fix the price thereof, to be less than those non charged by the parties of the second part for water."

The Court, speaking through Mr. Justice McKenna, held that said provision was a valid contract limitation upon the power of regulation. At page 570, the Court said:

"We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly, there was a contractural element; it was not, however, in granting the power of regulation but in the limitation upon it."

Likewise, what we have in the present case is a definite contract limitation on the general, continuing power of the board of supervisors (and of the Railroad Commission now standing in the shoes of the board of supervisors) to regulate the tolls of toll bridge companies.

What the Legislature did in said third stage, just prior to 1872, and what it did in enacting said Sections 2845 and 2846 of the Political Code in 1872, both show the intention of the Legislature to accord contract protection to the grantees of toll bridge franchises, by establishing a definite contract limitation upon the general power to regulate the tolls. The only difference between the legislation of the two periods is a slight dif-

ference in the details as to the exact terms of the contract protection accorded.

On pages 13-14 of their brief, appellees express a number of conclusions on the subject of the legislative intent.

Appelless first say that there is a clear legislative intent to subject toll bridges to continuing regulation as to their tolls. We agree with said statement if there be added the proviso that said regulation is subject to the definite contract limitation on which we rely.

Appellees next say that the Codes of 1872 do not prescribe a definite method for ascertaining the "base value" upon which the rate of return is to be calculated. We perceive no particular difficulty in this matter. Section 2845(3) of the Political Code specifies that for the first year the return shall be computed "on the actual cost of the construction or erection" and in succeeding years on "the fair cash value." To any one experienced in the regulation of public utility rates, those bases would appear to be sufficiently definite.

Appellees then express the further conclusion (Brief, p. 14) that there is no evidence to show that the return of 15 per cent mentioned in the Code "was intended to place toll bridges in a class set apart from other grantees of public franchises."

In making this statement, appellees have apparently overlooked the fact that ever since the early 50's toll bridge regulation in California has been in a class by itself. As the Supreme Court of California said in Newsom v. Board of Supervisors of Contra Costa County, 205 Cal. 262, 266:

"In other words, toll-bridge regulations have been from the early history of the state and now are in a class by themselves." In other words, toll bridge companies have, for the purpose of regulation, been treated by the Legislature as in a class by themselves and such classification has never been deemed to be special legislation or for any other reason unlawful.

On the subject of legislative intent, we believe it to be clear from what the Legislature did both before 1872 and in 1872 that it intended to and did grant to the grantees of toll bridge franchises contract protection in the nature of a contract limitation upon the general power of regulation.

#### 3. The Plain Meaning of the Language is that of Contract.

On page 12 of the brief of appellees, appears this heading:

"The language of the code sections is that of regulation and not of contract."

However, the material under that heading relates solely to "legislative intent", which matter we have already discussed.

Appellees do not undertake to reply to that portion of our opening brief which appears on pages 39 to 46 under the heading

"An analysis of the language of the contract shows the rights claimed by appellant."

To that analysis, the Court is respectfully referred.

4. There is Nothing in the Constitution of California Which.

Prohibits the Legislature from Making or Authorizing
the Making of Contracts Such as that Here Under Consideration.

On page 14 of their brief, appellees assert that "even assuming a legislative attempt to permit counties to

enter into rate contracts, the Legislature was prohibited by constitutional mandate from granting such authority."

Appellees cite three provisions from the California Constitutions of 1849 and 1879, but not one of them supports their claim.

Sections 31 of Article IV of the Constitution of 1849

read as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Section 1 of Article XII of the Constitution of 1879 reads as follows:

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

As will be noted, both sections refer to the formation of corporations, and the reserved power to alter or repeal is made applicable only to laws passed "pursuant to this section," i.e., laws relating to the formation of corporations.

These provisions have no application to the present situation. Sections 2845 and 2846 of the Political Code have nothing to do with the formation of corporations. They refer to the entirely different question of grants of franchises for the construction and operation of toll bridges. Such franchises may as well be granted to individuals or partnerships as to corporations.

The haue of impairment of contract obligations herein under consideration is in no way dependent on the fact that the grantee of this particular franchise happened to be a corporation. The issue would be exactly the same had the grantee been a partnership or an individual.

The present case involves no attempt to alter or repeal any provision of the articles of incorporation of

American Toll Bridge Company.

The statement of appellees (Brief, p. 14) that "the Supreme Court of California, in the judgment here appealed from, held \* \* \* that the State Constitution expressly reserved a right in the Legislature to repeal or alter such laws, the court referring to Article IV. Section 31 of the Constitution of 1849, and to Article XII, Section 1 of the Constitution of 1879," is correct if applied to laws relating to the formation of corporations, but the statement of appellees is not correct if applied to Sections 2845 and 2846 of the Political Code.

What the Supreme Court of California actually said

was (R. 131):

"The reservation of the power to repeal or alter the law (Const. art. IV, sec. 31, now art. XII, sec. 1), has been held to enter into the contract with the corporation."

The law there referred to was, of course, the law providing for the formation of the corporation.

Nor does appellees' claim find any more support in Section 21 of Article I of the Constitution of 1879, from which appellees quote as follows (Brief, p. 15):

"No special privileges or immunities shall ever be granted which may not be altered, revoked, er repealed by the Legislature, \* \* \*." This provision was not even referred to by the Supreme Court of California, and appellees cite no authority of any kind to show that it has any bearing on the present situation.

As the Court will observe, the provision relates only to the grant of "special privileges or immunities." The language is quite different from that frequently found in State Constitutions or Bills of Rights and reading as follows (See Louisville and Nashville Railroad Company v. Garrett, 231 U. S. 298):

"Every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

Referring specifically to the granting of franchises, it has always been held in California that the grant of a franchise is not the grant of a "special" privilege and does not fall within the language of Section 21 of Article I unless it is "exclusive" or "monopolistic."

Thus, Section 536 of the Civil Code of California grants franchises to telegraph and telephone companies: but because such franchises are not exclusive they do not violate Section 21 of Article I of the Constitution and are not grants of a "special" privilege.

Western Union Telegraph Company v. Hopkins, 160 Cal. 106, 122;

Postal Telegraph-Cable Company v. Railroad Commission of California, 200 Cal. 463, 472.

In other jurisdictions, it has been held, in harmony with our position, that the grant of a franchise containing provisions for the construction of a plant, system or works by a public utility and specifying also the rates to be charged, is not the grant of a "special privilege or immunity" under constitutional provisions con-

taining that language, where such franchise was not exclusive or monopolistic.

Omaha Water Co. v. City of Omaha, 147 Fed. 1, 6-7;

Omaha Electric Light & Power Co. v. City of Omaha, 172 Fed. 494, 496:

Water, Light & Power Co. v. City of Hot Springs, 274 Fed. 827, 835.

We believe it clear that Section 21 of Article I of the Constitution of California cannot properly be held to be applicable to the contract here under consideration. It is not an exclusive or monopolistic contract and it was entered into under provisions of the Political Code which were equally applicable to all corporations, parnerships or individuals who might make application for toll bridge franchises.

The Supreme Court of California did not find that Article I, Section 21, of the Constitution of California has anything to do with the present case and we shall not pursue the subject further.

There is no merit in the claim of appellees that there is any provision in the Constitution of California which prohibits the Legislature from authorizing or itself entering into the contract here under consideration.

## 5. The Decisions of This Court Show That Appellant's Position is Correct.

On pages 16-22 of their brief, appellees quote from Spring Valley Water Works v. Schottler, 110 U. S 347, and Stanislaus County v. San Joaquin and Kings River Canal and Irrigation Company, 192 U. S. 201 However, neither of these cases is in point, for the reason that the statutory provisions there under consideration were each part of the very statute under

which the corporation was incorporated and formed part of the corporation's corporate powers under said statute.

Under its reserved power to alter or repeal all statutes enacted under the two provisions of the Constitution of California hereinbefore quoted and referring to the fermation of corporations, the State, of course, had power to alter or repeal the specific statutory provisions at issue in those two cases.

It is a very different matter to attempt, in reliance on the power to repeal or alter a corporation's charter or articles of incorporation, to deprive a corporation of "rights and interests acquired by the company, not constituting a part of the contract of incorporation." That can not constitutionally be done.

Railroad Company v. Maine, 96 U. S. 499, 510.

The Court is respectfully referred to pages 52 to 58 of our opening brief, where we make a careful analysis of both the Spring Valley Water Works and the Stanislaus County cases and show that neither case supports

the position of appellees.

On page 23 of their brief, appellees cite Home Telephone and Telegraph Company v. City of Los Angeles, 211 U. S. 265, and Railroad Commission v. Los Angeles Railway Corporation, 280 U. S. 145. The Court is respectfully referred to pages 58 to 61 of our opening brief, where we analyze these cases. In each case, the Court held that on their specific facts, including the specific statutory provisions there deemed relevant, the State of California had not conferred on the City of Los Angeles (a political subdivision of the State) the authority to make the specific rate contracts there claimed. The Court fully recognized the power of the

State to grant such authority but found that on the facts the authority had not there been granted.

The question here is quite different. The State here had clearly conferred on the County of Contra Costa authority to enter into a franchise contract. There is no question here as to whether the State had authorized a political subdivision to write into the contract the crucial words in the present case, for the reason that said words were not written into the contract by the Board of Supervisors. They were written into it by the State itself; acting through its Legislature. The Board of Supervisors had nothing to do with said words. They were written into the contract by the State itself and were provided for when the State enacted said Sections 2845 and 2846 of the Political Code.

Hence there is here involved no question as to whether or not the State had delegated to a political subdivision the authority to write words of contract into a franchise ordinance.

The State's authority to do what the State here did can not be successfully challenged.

On page 23 of their brief, appellees cite but do not quote from Lorenz v. Stearns, 85 N. H. 494, 161 Atl. 205 (appeal dismissed and certiorari denied in Stearns v. Lorenz, 287 U. S. 565). The question there at issue was whether the Public Service Commission of New Hampshire had authority to reduce the tolls of a toll brule constructed under authority of a statute of 1901. The statute set forth the tolls to be charged.

By an earlier statute of 1891, the State had reserved to itself the power

"to alter, amend or repeal the charter of any corporation, or the law under which it was established, or may modify or amend any of its franchises, duties or liabilities." The Court will note the reservation of the specific right to modify or amend any franchise owned by the corporation—a matter quite different from the power to elter or repeal a corporation's charter or its articles of incorporation. In view of that reservation of power, the court, quite naturally, held that the State could later alter the tolls. The court's conclusion was as follows (p. 211):

"The conclusion arrived at is that the provision in the Act of 1901 was a mere regulation of the tolls to be charged, and that if it could be construed as a grant of right it was a franchise, repealable under the reserved power of the state. It was not an irrepealable contract entered into on behalf of the state."

In several passages of its decision, the court there referred to the undesirable situation which would exist if it be held that the owner of the franchise had a perpetual right to exact tolls as he pleased. In this respect, also, the case is quite different from ours, in which the claimed contract limitation could not, in any event, extend beyond 20 years and, in fact, will be in practical operation for not to exceed 16 years.

On page 24 of their brief, appellees cite Shirtds v. Ohio, 95 U. S. 319, and a number of other cases in support of the proposition that the state may, by constitutional provision, reserve the power to alter or repeal "laws respecting franchise privileges." Conceding that statement to be correct, it is, nevertheless, necessary to put the finger on a specific constitutional provision which has that effect. As we have already shown, there is no provision in the Constitution of California by which the State has reserved the power to alter or repeal a franchise acquired subsequent to the forma-

tion of a corporation and authorizing the construction and operation of works for supplying a public utility service.

Accordingly, none of said decisions cited by appelles are in point here.

It is, of course, true, as was said by the Court in Milwaukee Electric Railway & Light Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, that this Court will give all proper weight to the judgment of a state court which, in deciding a case of alleged impairment of contract obligations, has construed a state statute (Brief, p. 25). However, as we pointed out in our opening brief (p. 19), the independent examination which the Court makes in such cases is just as applicable where part or all of the contract consists of a state statute which was construed by the state court, as is the case where no statute is involved.

Indiana v. Brand, 303 U. S. 95, 100; Coombes v. Getz, 285 U. S. 434, 441;

Freeport Water Company v. Freeport City, 180 U. S. 587, 595, 610;

Walsh v. Columbus, Hocking Valley and Athens Railroad Company, 176 U. S. 469, 475;

Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.) 436, 443.

We do not consider it necessary to re-state the numerous decisions of this Court and other Federal courts recognizing the authority of the legislature to make, or to authorize the making of, contracts containing definite public utility rates or fares which could not be changed by public authority, during a specified reasonable time, or only if the yield should become greater than the one specified in the contract, and found that on the facts of the case such contract had been lawfully entered into

For some of the leading decisions, the Court is re-

spectfully referred to pages 65-70 of our opening brief.

However, because of its close analogy to the facts of the present case and because it establishes the precise legal principle which we believe to be here applicable we desire to refer again, for a moment, to Los Angeles v. Los Angeles City Water Co., 177 U. S. 558. In that case, as the Court will remember, the ordinance provided, in part, that the city council reserved the right to regulate the water rates but contained a proviso that the council should not reduce the water rates below the rates then in effect (p. 570). In upholding this contract limitation, this Court, speaking through Mr. Justice McKenna said (p. 570):

"Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it."

Appellees seek to distinguish said case on the ground that the Legislature there had enacted a statute ratifying the contract (Brief, p. 27). But that is exactly what was done in our case. We ask the Court to turn to page 28 of our opening brief, where we quote in full the ratifying Act of May 8, 1923 (St. 1923, ch. 131, p. 272). As we there point out, this statute was enacted only two months subsequent to the effective date of said Ordinance No. 171 and expressly ratified all franchises theretofore granted for the construction of toll bridges across specified waters including "Carquinez Straits."

At page 26 of their brief, appellees seek to minimize the effect of said ratification by alleging that the motive of the ratification was to remove some doubt as to the duration of the Carquinez Bridge franchise. However, there is nothing in the language of the ratifying statute or in the record in this case to justify that statement nor have we ever before heard any such comment. Even

if so, we submit that a ratification is a ratification and that its effect is not to be questioned because of the reason which may have animated somebody in urging it.

The simple fact is that appellant's franchise was ratified by the Legislature of California, just as was that of Los Angeles City Water Company, and that the sole ground on which appellees seek to distinguish Los Angeles v. Los Angeles City Water Co., supra, is shown to be without merit.

In closing our reference to the authorities bearing on the issue of impairment of contract obligations, we must express our surprise at the claim of appellees (Brief, p. 27) that the Supreme Court of California did not in County of Contra Costa v. American Toll Bridge Company, 10 Cal. (2d) 359, hold that Ordinance No. 171 constituted a binding contract. The contention is so obviously without merit that we shall merely ask the Court to read the decision and our reference to it on pages 28 to 30 of our opening brief.

We believe that we have now answered each point made in the brief for appellees on the issue of impairment of contract obligations. We submit that it appears very clearly that the Railroad Commission's order impaired the obligation of appellant's contract, for the reason that the Commission undertook to reduce appellant's tolls although the record showed without dispute and the Supreme Court of California found (R. 128) that at no time has appellant received a return of anywhere near 15 per cent.

We believe that the Court need go no further in this case and that on this ground alone the judgment herein should be reversed.

#### II.

#### Procedural Due Process.

We shall now reply to the brief of appellees on the issues of Procedural Due Process.

#### A

THE PROCEDURE OF THE RAILROAD COMMISSION CON-STITUTED A DENIAL OF DUE PROCESS OF LAW UN-DER THE PRINCIPLES MOST RECENTLY STATED BY THE COURT IN MORGAN v. UNITED STATES, 304 U. S. 1.

We understand the decision in the Morgan case to hold that in a quasi-judicial proceeding instituted by the Government against a public utility it is the duty of the Government, in some appropriate way, to advise the party against whom the Government is proceeding "of what the Government proposes" and to give him a fair opportunity "to be heard upon its proposals before it issues its final command".

In ascertaining whether or not that requirement has been met, the Court naturally asks itself the following questions:

Were the issues defined in the usual way by complaint and answer?

If not, did counsel for the Government advise what the Government proposed by some statement at the hearing or in oral argument?

If not, did counsel give the requisite information in a brief?

If not, did the administrative tribunal serve proposed findings or an intermediate report?

If not, did the Government, in any ther way, announce "its proposals before it issues its final command?"

In the Morgan case, the Government had done none of these things. In the case now before this Court, the Railroad Commission did none of them. On this issue of procedure, the two cases are completely identical.

The Court will find our analysis of the Morgan decision and its application to the facts of the present case fully set forth on pages 75 to 86 of our opening brief.

In reply, appellees make a response of only two paragraphs (Brief, pp. 28-9).

Either directly or by failure to reply, appellees admit as follows:

- (1) Here, as in the Morgan case, the proceeding was instituted by a mere order or notice of inquiry;
- (2) Here, as in the Morgan case, no charge or complaint, either formal or informal, was ever filed;
- (3) Here, as in the *Morgan* case, there being no complaint, no answer was or could be filed and no issues were ever defined by any pleadings;
- (4) Here, as in the Morgan case, the State did not make known what it proposed, by any oral argument or by any brief setting forth such proposals;
- (5) Here, as in the Morgan case, the State at no time prior to the decision, ever adviced appellant of what it proposed to do, by means of proposed findings, or intermediate report; and
- (6) Here, as in the Morgan case, by no means whatever, did the State ever advise appellant "of what the Government proposes" or give appellant a fair or any opportunity "to be heard upon its proposals before it issues its final command."

We see no escape from the conclusion that the principle of the *Morgan* case applies exactly to the facts of the present case.

Appellees seek to escape the effect of the decision by referring, without citation of supporting authority, to a number of matters which, in our opinion, are irrelevant or furnish no defense. The facts that a notice was given and a hearing held and evidence received and a decision rendered and a review provided do not furnish an answer to the principle in the Morgan case. Those things all happened there, also.

The fact that appellant did not insist that all the requirements of procedural due process be complied with is immaterial. How could appellant know that before the decision was rendered the Commission would not at some time and in some way advise appellant "of what the Government proposes?" How could appellant know that, even in the 24th hour, the Commission would still fail to afford appellant an opportunity "to be heard upon its proposals before it issued its final command?" The requirements of procedural due process are certainly not conditioned upon anticipation by the citizen of their violation. An administrative tribunal can not in any such way defend against its own failure to meet those requirements.

Appellees say that appellant waived the opportunity to argue or brief the case. What of it? By oral argument or brief, appellant could not possibly have advised itself "of what the Government proposes" and thus be heard upon the Government's proposals before the final command is issued. That duty rested upon the Commission and not upon appellant.

Appellees further say (Brief, p, 29) that they "can discover no allegation anywhere that appellant did not know exactly what the issues were." We do not understand how appellees can make that statement. They know full well that appellant has continuously insisted that it did not know what the issues were and that at

no time prior to the Commission's decision did it have any means of knowing.

Appellant, of course, knew that it was being investigated but it had no means of knowing where the lightning would strike.

The notice of inquiry (R. 30) provides in the most general terms, for an investigation "into the reasonableness of the rates, charges, contracts, classifications, rules and regulations, or any thereof, now charged or enforced by American Toll Bridge Company in the operation of" the Carquinez Bridge.

Whether the investigation and the final order would relate to appellant's fares for passengers or for the various types of passenger vehicles or to appellant's rates for freight or to the trucks transporting the same or to appellant's contracts or to its classifications of passengers or commodities, or to its rules and regulations, or to which thereof, appellant had no means of knowing.

Testimony was introduced as to tolls charged by appellant for automobiles, both on a cash and a commutation basis and for P.W.A. employees; for auto stages for trucks; for passengers in various vehicles and or foot; and for freight. A Commission witness testified at length concerning appellant's accounts. In not one of these matters, was appellant advised as to the Commission's proposals. There was nothing except testimony by witnesses not authorized to speak for the Commission and appellant's testimony in response.

The decision, when rendered, related to only two of the above matters, namely, the tolls for passengers on foot or in vehicles and non-commutation tolls for automobiles. But how was appellant to know what matters were to be covered? And the tolls actually established had not been even once mentioned by any one at any time during the course of the hearing or prior to the decision.

We conclude that appellee's defenses are unavailing, that the case is a clear case for the application of the principle of the *Morgan* case and that the denial of procedural due process is patent.

We also submit, very respectfully, that this would be an appropriate case for a declaration by the Court that the principle of the *Morgan* case, announced in a case relating to action by a *Federal* administrative officer, is equally applicable to the proceedings of *State* administrative tribunals or officers and that, on this ground alone, the judgment must be reversed if the Court deems it necessary or desirable to look beyond the issue of the impairment of contract obligations.

#### B.

THE PROCEDURE OF THE RAILROAD COMMISSION CON-STITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION FAILED TO MAKE FIND-INGS AS TO FAIR VALUE OR A PROPER RATE BASE AND TO MAKE ANY OF THE OTHER NECESSARY BASIC OR ESSENTIAL FINDINGS.

In our opening brief (pp. 86-99), we first drew attention to the decisions of the Court holding that it is the cuty of administrative tribunals to make "the basic and essential findings required to support" their orders. Referring specifically to public utility rate cases, we cited (p. 90) United Gas Public Service Co. v. Texas, 303 U. S. 123, in which case this Court held that procedural due process requires the findings which are there specified.

Turning then to the Railroad Commission's decision in the present case, we pointed out that the Commission failed to make any of the basic and essential findings required in a public utility rate case.

Specifically, we pointed out that

- (1) The Commission failed completely to make any finding as to the fair value of the property or the proper rate base;
- (2) While the order purports to establish a rate for 1938, there is no finding as to what gross revenue the rate established by the Commission will produce in 1938 or in any subsequent year;
- (3) There is no finding as to the reasonable amount of maintenance and operating expenses and taxes to be paid in 1938 or in any subsequent year;
- (4) There is no finding as to a reasonable and proper allowance for depreciation or depletion in 1938 or in any subsequent year;
- (5) There is no finding as to how many dollars will remain in 1938 or in any subsequent year for return on the fair value of the property; and
- (6) There is nothing whatever in the decision to show that the rates established by the Commission will yield even a return of 7.5 per cent on the fair value of the property or on a proper rate base.

The entire matter is left to speculation and conjecture and the Court is called upon, in the absence of any findings by the Commission, to do the fact-finding work which it was the Commission's duty to do.

We concluded that the Commission's failure to make said findings constituted plain denial of the requirements of procedural due process.

Appellees merely make, in two short paragraphs (Brief, p. 29), what appears to us to be an ineffective plea in confession and avoidance.

They say that it is "not alleged that appellant has suffered any disadvantage" from the failure of appellees to make the findings and, anyway, that such failure "cannot be a failure of due process in a procedural sense."

The 'disadvantage' both to this Court and to appellant is too obvious to call for comment.

While appellees say (Brief, p. 29) that they will make further reply while discussing the issue of confiscation, they nowhere in that discussion show that the Commission made the basic and essential findings to the absence of which we have drawn specific attention.

As the Commission completely failed to make findings on the fair value or any rate base and to make the other necessary basic and essential findings, we submit, very respectfully, that on this question, either in conjunction with other grounds or alone, the judgment should be reversed.

C.

THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION FAILED TO FOLLOW THE PRESENTLY EFFECTIVE RATE-MAKING RULE OR STANDARD PRESCRIBED BY THE LEGISLATURE OF CALIFORNIA FOR APPLICATION TO TOLL BRIDGE COMPANIES.

This point is developed on pages 100 to 111 of our

opening brief.

We there showed that the provisions of Sections 2845 and 2846 of the Political Code, on which we rely, have never been repealed. We believe that said provisions, when read into our contract, are the language of contract. If not, they are the language of regulation and as such constitute the unrepealed, presently effective legislative rule or standard of reasonableness of rates applicable to toll bridges in California.

In that event, it was the duty of the Railroad Commission to follow and apply that rule to the tolls of the Carquinez Bridge.

The Railroad Commission failed in that duty because it undertook to reduce the tolls notwithstanding the fact that the Commission found that said tolls have never yielded and do not now yield a return anywhere near as high at 15 per cent.

The Railroad Commission's failure to follow and apply said legislative rule or standard of rate making constitutes, under the decisions of this Court, denial of procedural due process of law (Opening Brief, pp. 106-111).

What do appellees say on this issue? Nothing at all. What they could reasonably have said, we do not know. In any event, they let the issue go by default.

We are satisfied that this is the third absolutely sound point as to denial of procedural due process raised by us and that on this point, as well as on the prior two, the judgment should be reversed.

EXCLUSION OF THE ANTIOCH BRIDGE. THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION UNFAIRLY, UNJUSTLY AND TRARILY SEVERED THE ANTIOCH BRIDGE FROM APPELLANT'S SINGLE, UNIFIED TRANSPORTATION SYSTEM AND FIXED TOLLS FOR THE CARQUINEZ BRIDGE ALONE, NOTWITHSTANDING THE FACT THAT THE RECORD SHOWS, WITHOUT DISPUTE, THAT THE INEVITABLE EFFECT OF THE REDUCTION OF TOLLS ON THE CARQUINEZ BRIDGE WOULD, BY FORCE OF COMPETITION BETWEEN THE TWO BRIDGES, COM-PEL APPELLANT TO MAKE LIKE REDUCTIONS IN THE TOLLS CHARGED ON THE ANTIOCH BRIDGE, A LOSING VENTURE, THUS ACCOMPLISHING BY INDI-RECTION A RESULT WHICH THE RAILROAD COM-MISSION COULD NOT ACCOMPLISH DIRECTLY.

In our opening brief (pp. 111-128), we pointed out

- (1) That the Carquinez and the Antioch Bridges of appellant are component ports of the single, unified transportation system of American Toll Bridge Company;
- (2) That they are located within only 25 miles of one another, serve largely the same territory at necessarily the same tolls and are distinctly competitive with one another, so that a reduction in the tolls charged by one of the bridges necessarily forces a like reduction in the tolls charged by the other bridge;
- (3) That the Railroad Commission unfairly, unjustly and arbitrarily excluded the Antioch Bridge and fixed tolls for the Carquinez Bridge alone, substantially lower than it would have done if it had fixed tolls for both bridges; that the Commission's action will force appellant to make a like reduction in the tolls of the

competitive Antioch Bridge, a losing venture; and that the Commission will thus be able by indirection to bring about lower tells than those which the Commission could have fixed directly; and

(4) That said unfair, unjust and arbitrary action of the Railroad Commission constituted, under the decisions of the Court, denial of procedural due process.

The Commission's entire handling of the Antioch Bridge matter was most unjust and constituted clear denial of that frank and fair dealing which the citizen has the right to expect from a tribunal charged with quasi-judicial functions.

What do appellees say in reply?

Conceding the facts to be as stated by appellant, appellees seek to defend on the ground that the existing competition "was wholly self-imposed" (Brief, p. 33). In other words, because appellant constructed and operates both bridges, the claim is that the Commission is justified in fixing tolls for the more profitable bridge alone, plucked out from the single, unified transportation system, and in refusing to fix tolls for the less profitable bridge!

We know of no such rule of law. The position thus taken certainly shocks one's sense of fairness.

In so holding, appellees close their eyes to the fact that these bridges were a great, pioneer enterprise, which distinctly served and do now serve the convenience of the public and that the public authorities found, and declared the enterprise to be a public necessity. Appellees forget that the construction of both these bridges received the enthusiastic acclaim of the public in the neighboring sections of California and that several thousand of these people subscribe to the capital stock of what was, in effect, a community enterprise.

Appellees seem to forget the testimony of their own witness, Mr. Mitchell, who testified (R. 290-1):

"It must be recognized that those who initiated and developed a project such as these toll bridges are entitled to be rewarded for their foresight and for the risk they have taken. The public, having held off until the results are more or less assured, must expect to pay for the pioneering of others."

Appellees have apparently also overlooked the following findings made by the Board of Supervisors of Contra Costa County at the time when they granted the franchise for the construction of the Carquinez Bridge (R. 271):

"That the expense of the erection, construction and maintenance of such a toll bridge as a free public highway is, in the opinion of the board, and this board so determines and finds, too great to justify the erection, construction and maintenance thereof by the counties of Contra Costa and Solano.

"That said bridge is a public necessity. That in the opinion of the board the public good and interests require the construction of said bridge. That the public good and public necessity will be promoted by the erection, construction and maintenance of said bridge as proposed by the said Rodeo-Vallejo Ferry Company, a corporation."

After referring to these two bridges, the Supreme Court of California said (R. 131):

"The Toll Bridge Company purchased and operated the competitive factors for the obvious purpose of reducing competition, and it has undoubtedly succeeded in accomplishing that end."

The Court reached this conclusion on an erroneous understanding of the facts. Appellant did not purchase

either bridge, to reduce competition or for any other purpose. Appellant itself constructed both bridges contemporaneously as parts of a single, unified transportation enterprise, with the approval of the public authorities.

It is, of course, true, as stated by appellees (Brief, p. 32) that the due process of law clause alone does not protect public utilities against the hazards of competition from some other utility, either public or private, but that principle obviously does not apply to the facts of the present case.

Referring to Clarksburg-Columbus Short Route Bridge Co. v. Woodring, et al., 89 Fed. (2d) 788, analyzed on pages 126-7 of our opening brief, appellees say that the decision "held merely" that the owner of the competing bridge "was entitled to a hearing in any proceeding affecting its interests" (Brief, p. 33). What then? Having accorded a hearing, is the rate-fixing agency then to close its eyes to the actualities of the competitive situation and to fix rates applicable to one bridge alone on the fair value of the property and the revenues and expenses of that bridge alone?

We submit that appellees have missed the point of the case. After stating that "the underlying consideration which confronted the Secretary was the competitive situation here involved" (p. 793), the Court concluded as follows (p. 794):

"We think the lower court was in error in holding that the Secretary was not required to consider the effect of the new rates 'upon another bridge 20 miles distant'. This loses sight of the fact that these two bridges are integral parts of a single transcontinental highway, the branches thereof dividing east of the bridges and converging again west of the bridges, thus dividing the traffic, as the public may find convenient, between

the two bridges in question. It is difficult to imagine a case where a rate reduction on one instrumentality of commerce more directly affects another than in the case here presented.

"The decree is reversed and the cause remanded for further proceedings not inconsistent with this

opinion."

After having made these various defenses in justification of the Commission's failure to fix tolls for the Carquinez and the Antioch Bridges together, appellees, in their concluding paragraph on this subject (Brief, p. 34), reverse their position and say, in apparent recognition of the soundness of appellant's position, that the Commission did say "that consideration would be given to the effect of the rates fixed, on the company as a whole."

However, that this statement of the Commission was an inadvertence, is shown by the fact that nowhere in the Commission's entire decision is there any finding or any declaration of any fact to show that such consideration was actually given. The tolls fixed were specifically applicable to the Carquinez Bridge alone (R. 38). Testimony recited by the Commission and relating to the possibility of new tolls, referred exclusively to the Carquinez Bridge (R. 36-38). Nowhere in the decision is there any finding as to the fair value of appellant's property in both bridges, or the gross revenue which the new tolls would yield from both bridges or the operating expenses of various kinds to which both bridges would be subject under the new tolls. The decision was rendered in obvious complete disregard of the fact that reduced tolls on the Carquinez Bridge would inevitably force like reduced tolls on the Antioch Bridge and of the effect of such reduction on appellant's entire gross revenue and net income.

There is absolutely nothing in the decision, on which anyone can put the finger, to show that the Commission, in fact, gave any consideration to the Antioch Bridge, or, if so, what consideration. In fact, the Commission's only action in the matter was to the very reverse effect when it denied appellant's motion to consolidate the hearing in Cases 4244 and 4259, in so far as American Toll Bridge Company was concerned (R. 334). This motion shows on its face that it was made for the very purpose of having both bridges considered to gether and having tolls fixed for both bridges. (R. 203-206).

We respectfully submit that the mere fact that necase exactly like this one on its facts has heretofore come before this Court, is not determinative of the matter. The principle on which we rely is the broad principle of fairness and justice which underlies the requirements of procedural due process and which has been applied by this Court to the varying facts of many different situations, some of which are pointed out in our opening brief (pp. 73-75, 120).

Was the Commission's action in excluding the Antioch Bridge fair and just? Or was it unfair, unjust and

arbitrary?

We submit, very respectfully, that the Railroad Commission's exclusion of the Antioch Bridge was an unfair, unjust and arbitrary abuse of discretion in determining the proper unit for the rate base and constituted patent denial of procedural due process of law.

This is the fourth respect in which the Commission's procedure constituted denial of procedural due process. We submit that on each of these four grounds the judgment should be reversed if the Court should find it necessary or desirable to go beyond the issue of the impairment of contract obligations.

## III.

### Due Process-Confiscation.

#### A.

THE RAILBOAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN THE CARQUINEZ BRIDGE BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE

Turning, finally, to the issue of confiscation, and, first, as to the Carquinez Bridge alone, we found ourselves considerably embarrassed and impeded by reason of the Railroad Commission's failure to make the basic and essential findings which are necessary under the requirements of procedural due process of law. This is a matter on which we have already commented.

However, we have done our best, under the circumstances, and have analyzed the facts in appropriate detail on pages 129 to 174 of our opening brief.

In so doing, we have, in order to be fair, resolved important doubts against ourselves. As a minimum fair value or rate base, we took the lowest reliable figure shown by the evidence. The gross revenues and the operating expenses, including ordinary expenses of operation and maintenance, taxes of various kinds, depreciation and depletion, we computed from the tolls actually established. Prior to the decision, there was no inkling as to what those tolls would be. Appellees concede, in their brief, that, with only three exceptions, our figures are fair and accurate and may be accepted.

On the *minimum* fair value of the Carquinez Bridge alone, we find that the new tolls would yield a return of only 6.6 per cent.

On the very unusual facts of the present case, including the great hazards of construction and traffic, and the necessarily high cost of the money invested in the

enterprise, we urge that such return would be confiscatory, for the reason that a return of only 6.6 per cent on a minimum fair value of the Carquinez Bridge would be

—less than the return of 7.5 per cent which the Commission found that the Company should receive (R. 38);

—less than the actual cost in 1938 of all the money in the project, determined to be 7.851 per cent (Ready, Exh. 129, R. 476, 480);

—less than the cost of money in connection with the original bond issue of 1925, determined by Mr. Coleman and Mr. Ready to be 9.71 per cent (Coleman, Exh. 1, R. 209, 222; Ready, Exh. 129, R. 476, 477);

—less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95 per cent (Ready, Exh. 129, R. 476, 478);

-far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money (Ready, Exh. 129, R. 476, 479-80); and

—substantially less than the rates of return which the Federal courts have generally required to avoid confiscation in cases of small and hazardous enterprises (Opening Brief, pp. 164-169).

We shall now address ourselves to the brief of appellees on this issue.

On page 35 of their brief, appellees refer to the figure of \$8,632,622.46 as being the rate base claimed by appellant. That is the *minimum* fair value or rate base claimed by appellant in view of the Commission's failure to find a fair value or a proper rate base.

. On the same page, appellees say that the Commission's order fixes rates "upon a base of \$7,949,954.00." There is nothing in the Commission's decision to jus-

tify that statement. As we have repeatedly pointed out, the Commission made no finding as to fair value, or a proper rate base.

While the Commission narrated evidence as to certain figures bearing on cost or value (R. 37), including testimony that the original cost of the Carquinez Bridge was \$7,949,954.00, there was no finding (as distinguished from a mere narration or recital of evidence) that said figure was really the original cost. In fact, the Commission said that there were included in the book costs items not specified which appeared to be more properly chargeable to other than capital accounts, as well as other unidentified items as to which no information was available (R. 37). There is nothing to show whether the Commission finally decided to deduct any of these items, and, if so, which of them and in what amounts, in order to determine even "original cost" or "book cost."

And the decision is absolutely bare of any figure which the Commission found to be fair value or a proper rate base. Said figure of \$7,949,954.00 is merely counsel's figure, taken after the event. It is not a finding by the Commission.

On page 36 of their brief, appellees quote from the testimony of appellant's witness, Mr. Lester S. Ready, for many years the Commission's chief engineer. The inference in the comment of appellees that Mr. Ready testified as to the book cost as being "a reasonable rate base" is entirely without justification. In fact, in Exhibit 117 (R. 411, col. 2), Mr. Ready showed that it would be necessary to make certain additions to said figure of \$7,949,954.00, bringing it up to \$8,332,622.46, even before any consideration was given to the value of the property as a going concern.

The quotation from Mr. Ready's testimony appear ing on page 36 of the brief of appellees relates to Mr. Ready's Exhibits 132 and 134. In those exhibits, prepared for the purpose of testing the rate of return which would be vielded by the rates heretofore in effeet (Exh. 132), and by a rate of 50 cents suggested by one of the witnesses (Exh. 134), Mr. Ready used as a rate base the original cost, before any of the necessary adjustments were made therein. Mr. Ready testified that he was using this figure as "the lowest figure that reasonably could be applied to the property," and also that he was using it as a matter of convenience because he was going back to the beginning of the property as well as forward to 1948, and that the book cost was the easiest figure to use because it could be used "without making numerous adjustments."

But at no time did Mr. Ready testify that said figure was fair value or a proper rate base. In fact, he testified that the figure should be increased to \$8,332,622.46 (R. 411, col. 2) to include an additional necessary allowance for interest during construction and also that an additional allowance of between \$250,000 and \$300,000 should be made as representing the fair value of the franchise of the Rodeo-Vallejo Ferry Company, acquired by appellant (R. 471-4).

As the results of Exhibits 132 and 134 showed an accumulated deficit in 1948 for both bridges amounting to \$745,826 under existing tolls (R. 495, last column), and to \$3,996,962 under the 50 cent toll suggested by one of the witnesses (R. 506 C; last column), it was obviously not necessary to pursue the subject further and to make the necessary additions to book cost.

Appellant has never claimed and does not now claim that the figure of \$7,949,954 used by counsel for appel-

lees is fair value or a proper rate base. Obviously, it is substantially too low.

On page 37 of their brief, appellees state that "there is not a line of evidence respecting the measure or even the existence of going concern value." When we shortly discuss the subject of "going concern value," we shall show that this claim is devoid of merit.

On page 37 of their brief, appellees claim that appellant has at no time "made and pressed a claim for the acceptance of any higher value" than \$7,949,954. That this claim is without merit is shown by the fact that at all times following the Commission's decision, appellant has claimed that a minimum fair value of the Carquinez Bridge is \$8,632,622.

Appellant made that claim in its Petition for Rehearing before the Railroad Commission (R. 54); in its briefs and argument before the Supreme Court of California (R. 136); in its Petition for Rehearing before the Supreme Court of California (R. 163-175); and in its Opening Brief herein (pp. 144-5).

The suggestion appearing on page 37 of the brief for appellees that there is a variance between the representations made by appellant bfore the Commission and those now made before this Court is entirely without • foundation.

On page 37 of their brief, appellees further say: "True, the Commission did not expressly find that the value or base taken was considered reasonable, \* \* \*."

We go further and point out, again, that the Commission did not expressly or at all find any value or base.

Opposite page 38 of their brief, appellees set forth a tabulation entitled: "Carquinez Bridge estimated future traffic, rate base, operating revenues, expenses and return."

This tabulation does not contain any findings made by the Commission, but is merely a tabulation prepared by counsel for appellees subsequent to the decision, and principally from figures supplied by appellant.

The first column shows appellant's analysis of the effect of the Commission's decision if applied to the 1938 business, and show a return of only 6.6 per cent on minimum fair value or rate base.

Each subsequent column shows a return computed on a base of only \$7,949,537, being a figure assumed by counsel for appellees and being far below what we claim to be fair value or a proper rate base.

The columns for the years 1938 to 1943, inclusive, are computed on a toll of 50 cents, which was suggested by one of the witnesses but was not established by the Commission. In other words, the only column which uses the tolls actually established by the Commission is the first column.

It is clear that even at the low rate base used by counsel, the rate of return for each of the years 1938 to 1943, inclusive, is substantially less than the cost of money in connection with the original bond issue of 1925, hereinafter found to be 9.71 per cent, and also below the cost of money in connection with the refunding bond issue of 1935, hereinafter found to be 8.95 per cent.

We do not believe that further comment on the tabulation would be warranted.

On page 38 of their brief, appellees refer to a paragraph from the Commission's decision, quoted by us on page 92 of our opening brief. This paragraph narrates some of the evidence contained in Mr. Ready's Exhibit 134, but fails to follow the exhibit through. The Commission apparently thought that the amount of money required for payment of Federal income and

State franchise taxes in 1938 would be the amount to be paid in 1939—a patently erroneous conclusion.

Of said paragraph thus quoted, we may say,

(1) The paragraph merely narrates or recites evidence but makes no findings of fact;

(2) Even in its recitation of evidence, the paragraph refers to results based on a 50 cent toll which was not established by the Commission. Nowhere in this paragraph, nor anywhere else in its decision, did the Commission make any finding as to the number of dollars of gross revenue or of operating expense which would or might be expected to result from the tolls actually established by the Commission.

The percentage figure of 7.42, appearing on page 38 of the brief for appellees, is merely a figure of counsel for appellees made in the absence of the basic and essential findings which the Commission should have made in order to avoid denial of procedural due process.

On page 39 of their brief, appellees say that on the issue of confiscation of the Carquinez Bridge property there are only three points of difference between appellant and the Commission. But there is no way of telling what the Commission did as to any of these three matters, except that the Commission obviously did not value the property as a going concern. It would have been more accurate to say that counsel for appellees are now willing to accept appellant's figures with the three exceptions named by them. We shall now consider each of said three exceptions.

On page 39 of their brief, appellees refer to "the rate base taken by the Commission." Constant iteration and reiteration by counsel, after the event, of what is not a fact, does not make it a fact. The decision does not show that the Commission found or took any rate base, or, if so, what it was.

Turning now to the subject of interest during construction, appellees concede (Brief, p. 40) that their assumed figure of \$7,949,954 includes only \$688,092 for that item. Said sum of \$688,092 constitutes interest during construction on only that portion of the construction capital which appellant secured from the sale of bonds in 1925. The figure contains nothing for interest during construction on that part of the construction capital which was secured by the Company from the sale of its capital stock, or from any other source than from the sale of bonds (Réady, R. 521).

Both Mr. Mitchell, witness for the Commission, and Mr. Ready, witness for appellant, agreed that interest during construction must be computed on the entire construction capital. Mr. Mitchell testified that the amount should be \$1,103,634 (Mitchell, R. 320; Exh. 16, R. 247, 257, col. 3). In order to be fair, we are willing to accept Mr. Ready's lower figure.

The desire of counsel for appellees to limit the allowance to \$688,092 is contrary to the undisputed testimony of the witness for both the Commission and appellant, and does not, in our opinion, require further consideration.

On page 40 of their brief, appellees, after discussion of the subject of ir erest during construction, say: "It (the assumed rate base) includes other overhead or indirect charges additional to the cost of the physical structure totalling fully \$2,000,000, or about 35 per cent."

The quoted language relates to an estimate of the witness Mitchell, and may be misleading, because said sum of \$2,000,000 actually includes the allowance for interest during construction and is not confined to other overhead charges (Exh. 16, R. 247, 257, bottom of page col. 1).

On page 40 of the brief for appellees, appears a short paragraph on the subject of going concern value. Appellees say that our request for an allowance for that item "is without any evidentiary basis whatever." This statement is not supported by the evidence. Mr. Ready's Exhibit 132 (R. 491, 493, 494, 495) contains an absolutely complete statement of all receipts and expenditures of the Company from the very beginning as to the Carquinez Bridge alone, and the Antioch Bridge alone and American Toll Bridge Company as a whole, from which figures the cost of developing the business can be ascertained with a completeness and certainty seldom found in a public utility rate case.

• Furthermore, Mr. Ready presented an exhibit and testified fully with reference to the fair value (between \$250,000 and \$300,000) of the franchise of Rodeo-Vallejo Ferry Company acquired by appellant and clearly constituting an element of going value (R. 471-4). Reference to additional testimony will be unnecessary.

The allowance claimed by appellant for this element of value is most reasonable (Opening Brief, pp. 136-143).

There is nothing in the Commission's decision to show that appellant's property was valued "as a going concern." The subject is not once mentioned in the decision. It now appears from the brief for appellees (p. 40) that it is their position that no allowance should be made for going concern value. They defend the Commission's refusal to so value the property. In this, there was fundamental error of law.

Turning now to operating revenues to be yielded by the Commission's tolls, counsel seems to accept our figures (Opening Brief, p. 148) as correct. Referring now to operating expenses, counsel accept all of our figures (Opening Brief, p. 148) except that they assume as money to be paid for Federal income taxes in 1938, moneys which will actually be paid not in that year, but in 1939. As we showed in our pening brief (pp. 149-50), this contention lacks merit.

This is a rate case, not an accounting problem. The Commission has never prescribed a system of account

ing for toll bridge companies.

Our method of handling the matter is in accord with the actual accounting practice of appellant from the very beginning (R. 524).

No witness testified on the subject other than Mr Ready, and our position is in accordance with his exhibits and testimony (Exhs. 132, 134, R. 491, 505; R 524).

The claim now made by counsel for appellees is with out support in the record and is directly contrary to the only testimony and exhibits on the subject. We submit that appellees are bound by the undisputed testimony.

It thus appears that the rates fixed by the Commission will yield on a minimum fair value or rate base of the Carquinez Bridge, a return of 6.6 per cent, and no more. The figure of 7.25 per cent appearing on page 41 of the brief for appellees is the figure of counsel for appellees based on the above erroneous handling of Federal income taxes in 1938, and may be disregarded

We are thus confronted with two remaining questions of fact.

What was the cost of money on this hazardous and difficult enterprise? and

What is the relationship between that cost of money and a fair rate of return?

The first question was exhaustively reviewed by us in our opening brief (pp. 151-8). We showed the following costs (Opening Brief, p. 172):

Actual cost in 1938 of all the money in the project,

7.851 per cent;

Cost of money in connection with the original bond issue of 1925, 9.71 per cent; and

Cost of money in connection with the refunding bond issue of 1935, 8.95 per cent.

What do appellees say?

Referring first to the cost of money in connection with the original bonds issued in 1925, counsel would eliminate 565,000 shares of stock which were necessarily issued by appellant in order to make possible the sale of its bonds. (Brief, p. 43.) If these shares had not been issued, it would have been impossible to sell the bonds at all, or the increased interest and discount would have been such as to bring about an equivalently higher cost of money. This stock is clearly a part of the cost of the bond money.

The facts are set forth in Exhibit 1 of Mr. Coleman, the Commission's own witness (R. 221-2), and in Exhibit 129 of Mr. Ready (R. 476-7). Both witnesses agreed as to the facts and as to the necessity of including this stock in computing the cost of the bond money.

Testifying on this subject, Mr. Coleman, the Com-

mission's witness, said (R. 340):

"Q. (by Mr. Thelen): Now, on page 16 I find, Mr. Coleman, that you have set forth near the top of the page, in connection with stock financing, an item of \$800,000 representing stock issued to the purchasers of the bonds?

"A. (by Mr. Coleman): Yes, sir, that stock was issued to the underwriters of the bonds, who were the purchasers, of course.

- "Q. As I understand it, it was 500,000 shares shown on the books at \$1.60, making a total of \$800,000?
  - "A. That is correct.
- "Q. I imagine that while you were examining the Company's records you found the contract, did you not, which provided for the issue of that stock?

"A. Yes, sir.

"Q. And you haven't any doubt, Mr. Coleman, have you, that the stock was actually issued?

"A. No, I have no doubt.

- "Q. And I suppose you are expressing no opinion as to whether it was necessarily issued or not?
- "A. Well, there seemed to be a necessity, as I gathered; the underwriters wouldn't take the bonds unless they were also given that stock."

Subsequently, there occurred the following further colloquy between Mr. Thelen and Mr. Coleman (R 341-2):

"Q. (by Mr. Thelen): You have made a very careful analysis of the cost of money, Mr. Coleman, and I would like to ask you a few questions on that subject beginning with page 17. As I understand it, on page 17 you refer to the original bond issues as distinguished from the refinancing in 1935?

"A. (by Mr. Coleman): Yes, sir.

"Q. Now, am I correct in assuming that you have ascertained that, as far as the original bond issues were concerned, the cost of the bond money on the straight line basis was 9.42 per cent?

"A. That is the figure I obtained, if my arithmetic is correct.

"Q. I certainly would not challenge your arithmetic. Mr. Coleman, so we will assume that is correct. And if we include also certain items totaling \$116,639 which might properly be considered as bond expense, the cost

of money would be raised a little, to 9.71 per cent on the straight line basis?

"A. Yes, sir. That includes, of course, the amortization of the bonus stock."

Counsel's contention is thus contrary to the undisputed testimony, including that of the Commission's own witness, Mr. Coleman. Said contention must, a cordingly, be disregarded.

Mr. Coleman and Mr. Ready were correct in agreeing and testifying that the cost of money in connection with the original bond issue of 1925, with amortization on

the straight line basis, was 9.71 per cent.

Turning next to the cost of money in connection with the refunding bond issue of 1935, that cost, with amortization on the sinking fund basis, the lower one of the two bases, was 8.95 per cent. The details appear in Mr. Ready's Exhibit 129 (R. 476, 477-8).

In the brief for appellees (p. 44), counsel set forth a computation to show that this cost was only 6.78 per cent. However, that computation is clearly erroneous for each of the following two reasons:

- (1) It left out entirely the *premiums* amounting to \$131,300 necessarily paid by appellant on the retirement of the bonds called in 1935 (R. 478). The correction of this error will raise said 6.78 per cent to 7.957.57 per cent.
- (2) It also left out entirely the unamortized discount and expenses incurred in connection with the issue of the original bonds in 1925 and still remaining unamortized in 1935, amounting in 1935 to \$440,521.88 (R. 476, 478). The correction of this error will raise said 7.957 per cent to 8.95 per cent, being the correct figure, with amortization on the sinking fund basis (R. 478).

The statement in the brief for appellees (p. 44) that by 1935 appellant had written off all the stock issued in connection with the original bonds of 1925, is inaccurate. What appellant had done was to write off, by 1935, \$1,149,791 out of the \$1,590,492 (R. 477) of the discount and expenses in connection with the original bond issue, leaving, however, \$440,521.88 (R. 478) still to be written off. There is nothing to show that in writing off said discount and expenses, appellant first wrote off said stock. There is not an iota of evidence to support such claim. Of course, if that had been the case, there would be even less argument to support counsel's effort to disregard the \$440,521.88 of unamortized discount and expenses still remaining in 1935.

We submit that the above errors in the computation of counsel are patent and that the undisputed testimony shows that the cost of money in connection with the refunding bond issue of 1925 was, with amortization on the sinking fund basis, 8.95 per cent (R. 478).

To the undisputed evidence (Exh. 129, R. 476, 480, col. 4) that, as of 1938, the average composite cost of all the money from bonds, stocks or in the depreciation reserve, was 7.851 per cent, appellees make no response in their brief.

We now address ourselves to the one remaining question of fact under this issue, which is the relationship between the cost of money to appellant and a fair rate of return.

We developed this subject fully on pages 158 to 164 of our opening brief. As we there showed, by copious references to decisions of the Railroad Commission, as referred to and tabulated in Mr. Ready's Exhibit 129 (R. 476, 478-83), it has been and is the Railroad Commission's established policy to allow a rate of return

somewhat in excess of the cost of the money invested in a public utility property.

In the case of large and well established utilities, the rate of return allowed has averaged 1.15 times the weighted average cost of money to said utilities, figuring bond discount and expenses on the sinking fund basis. In the case of more hazardous utilities, such as natural gas companies, the multiple has run as high as 1.28 (Opening Brief, p. 161; R. 479, 480). If said smaller multiple of 1.15 is applied to the average cost of all appellants' invested money in 1938, found to be 7.815 per cent, the resulting fair rate of return, on this basis, would be 9.029 per cent (Exh. 129, R. 476, 480, last col.). Mr. Ready testified that a fair return to be allowed in this case throughout the life of the franchise would be 9 per cent (R. 490), and his testimony is the only testimony on that subject in the record.

On this subject, the brief for appellees contains only one paragraph. On page 42, counsel say that it has been the Commission's policy to provide a rate of return so that the interest return on all capital shall equal the interest rate which the utility must pay currently on borrowed money, bearing fixed interest charges (i.e., bonds). If that statement means that the capital represented by the proceeds from the sale of capital stock, especially in a hazardous enterprise, must be content with a return, years later, equivalent to the low interest rate which the company may enjoy on a small bond issue to refund what is remaining of a large original bond issue, the Commission is establishing a new policy which is obviously unfair to the stockholders. There is nothing in the record to justify said statement in the brief for appellees, and no decision of the Commission is cited in support thereof.

Even that policy, however, when the cost of the refunding bond issue of 1935 is correctly computed, would result in a rate of return of at least 8.95 per cent, as compared with our claim of 9 per cent.

We respectfully submit that in the light of the specific facts of this particular case, a return of less than 9 per cent, particularly a return of only 6.6 per cent on a minimum fair value or proper rate base of the Carquinez Bridge is clearly confiscatory.

B.

# THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH THE CARQUINE AND THE ANTIOCH BRIDGES BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE.

Considering the Carquinez and the Antioch Bridges together, as parts of a single, unified enterprise, we showed on pages 174 to 178 of our opening brief that the tolls fixed by the Commission, when charged by both bridges, will produce a return of only 5.6 per cent on a minimum fair value of \$10,780,411.

Said figure of \$10,780,411 is the *lowest* of the three figures shown by the record as being applicable to this situation (Opening Brief, pp. 174-5). That, on the specific facts of this particular case, a return of only 5.6 per cent would be confiscatory, can hardly be gainsaid.

On this entire subject, the brief for appellees contains only the following sentence (p. 45): "It might be demonstrated by the very figures presented by appellant in its brief that its income from both bridges will yield in excess of 6.8 per cent, not merely 5.6 per cent as it asserts."

However, counsel do not undertake to make any such demonstration and we are satisfied that it could not correctly be done.

Our own figures are set out in complete detail in our opening brief (pp. 176-7).

From the conclusion that these figures show con-

fiscation, we see no escape.

We submit that it is too clear for further analysis that, because of the confiscatory effect of the Commission's order when applied, as it fairly must be, to both the Carquinez and the Antioch Bridges, the judgment of the Supreme Court of California must be reversed.

C.

THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH BRIDGES, FOR THE FURTHER REASON THAT IT FAILED TO RECOGNIZE AND GIVE EFFECT TO THE RIGHTS OF APPELLANT IN ITS WASTING ASSETS, NAMELY, THE CARQUINEZ AND ANTIOCH BRIDGES, THE TITLE TO BOTH OF WHICH BRIDGES WILL PASS TO THE ADJACENT COUNTIES ON THE EXPIRATION IN 1948 OF THE FRANCHISES GRANTED BY SAID COUNTIES FOR THE CONSTRUCTION AND OPERATION OF SAID TWO BRIDGES.

In our opening brief, on the subject of wasting assets, we first pointed out that it is well established that a public utility which owns and operates a wasting asset is entitled to receive rates sufficiently high so that, in addition to being able to pay its expenses of operation, maintenance and taxes, and receive a fair return, it will also be able to take care of both depreciation and depetion. Leading decisions establishing that principle are cited (Opening Brief, pp. 179-183).

We then pointed out that the Railroad Commission failed to apply the law of wasting assets (Opening

Brief, pp./183-5).

Next, we pointed out that the Railroad Commission made no finding as to the amount to be allowed for

either depreciation or depletion (Opening Brief, p. 185).

In their brief herein, appellees say that the latter statement is "false" (Brief, p. 45). This is an unfortunate statement which appellees cannot support. No where in the Railroad Commission's decision is there any finding whatever as to how many dollars should be allowed and were being allowed for 1938 or for any subsequent year, whether for depreciation or for depletion.

Appellees support their statement (Brief, pp. 45-6 by a reference to Exhibit 134. That exhibit was not even introduced by a witness for the Commission. I was introduced by Mr. Ready, one of appellant's witnesses. Not by the widest stretch of the imagination can Exhibit 134 be construed to be a finding of fact by the Commission.

Appellees (Brief, p. 46) then quote Mr. Ready's testimony as to what he did in computing amortization is one of his exhibits. As though that were a finding by the Commission!

It is perfectly obvious from a reading of the Commission's decision that when appellant said that the Railroad Commission made no finding as to the amount to be allowed for either depreciation or depletion, appellant told the exact truth.

In its opening brief, appellant next attached as Appendix No. 3, an exhibit entitled "Estimated Operating Results—American Toll Bridge Company—1938-194—Under Rates as per CRC Decision."

The exhibit was prepared for the purpose of determining whether or not the tolls established by the Commission will enable appellant to meet its obligations to its bondholders and its stockholders by the time the property in the bridges passes to the adjacent counties.

in 1948. The items for "bond interest and bond retirement" are the actual requirements under the Company's bond mortgage. The money remaining at the end of each year, after the other obligations to the Company's bondholders and stockholders have been met, is simply used to retire capital stock at \$1.00 per share.

The exhibit shows that at the end of the franchise period in 1948, the revenues from the rates now fixed by the Commission will have failed to retire 437,167 shares of stock of the par value of \$1.00 per share.

The exhibit further shows that said revenues will have failed to apply as much as a single dollar on the \$2,-404,600 of the dividend at 8 per cent which the Company failed to earn and declare during the period from May 21, 1927, to December 31, 1935. Said figure of \$2,404,600 includes nothing whatever for interest on deferred payments.

Finally, the exhibit shows unretired capital stock at \$1.00 per share, plus unpaid dividends at the end of the

franchise period, totalling \$2,841,767.

Appellees do not challenge the accuracy of any figure appearing in this exhibit. The Court may, accordingly, accept all of the figures. Neither do appellees challenge the accuracy of the conclusions reached, which conclusions the Court may likewise accept with safety. In other words, the exhibit concededly speaks the truth.

Then what do appellees say as to this exhibit?

First, they say that what appellant seeks "is the making good of such asserted deficiency, as well as to set aside enough to fully retire the bridge investment" (Brief, p. 46). In making this statement, appellees are in error. What appellant seeks is sufficient tolls so that it may, by 1948, completely meet its obligations to its bondholders and its stockholders or so that it may, after paying its expenses and receiving a fair return, retire

its investment (i. e., the money invested in the enterprise) by 1948. These matters are fairly equivalent to one another, but they are alternative and not additive. The tolls established by the Commission will not enable appellant to do either of these things (Appendix No. 3 and No. 4 to Opening Brief).

Appellees then say (Brief, p. 46): "It (the Company) does not reveal that out of earnings and out of its depreciation reserve it had, by August 1, 1937, reduced its bonded debt to \$3,544,000 (R. 212) or that it had seen fit to reacquire for cash a considerable amount of its own stock (R. 220), or to invest cash in the purchase of ferry properties (R. 212)."

We regret that appellees should make such statements. The matters which appellees say we have not revealed are all set forth in our Exhibit 116, introduced by Mr. J. Wilbur Haines, appellant's witness, and were by us made a part of the Transcript of Record herein. We are not concealing anything. In fact, the record which we have made in this case, giving the complete operating revenues and expenses, in all appropriate detail, for each year from the beginning until 1937 (Exh. 132, R. 491, 493, 494, 495), together with complete estimates for each of the years from 1938 to 1948, inclusive (Exh. 132 and Exh. 134, R. 491, 505), are among the most complete showings that have ever come to our attention in any public utility rate case.

Furthermore, the reduction of appellant's bonded debt and the retirement of its capital stock, by 1948, is the very thing which appellant must urgently insists on the right to do. What it has already done along this line, although insufficient to date, is exactly what appellant should be doing.

Finally, appellees say (Brief, p. 46): "It seems obvious enough, therefore, that no matter how the stocks

holders of the corporation may ultimately fare, any deficency in their dividends to date does not, of itself, evidence confiscatory earnings from the bridge property."

Appellees thus express the following two thoughts:

First, they show that they are not interested in how the stockholders may ultimately fare. That is exactly the position taken by the Commission in its decision. We feel that we have a just right to complain of that position.

Second, any deficiency in dividends merely to date, does not of itself evidence confiscation. We have not so claimed. If we are permitted to make sufficient earnings hereafter, we hope to be able to make good our unfulfilled obligations to our stockholders. What we have urged, and what we now must earnestly urge, is that we be permitted earnings sufficient so that by 1948 we shall have been able to meet our obligations to our bondholders and our stockholders.

The reduction of our tolls so as to make it impossible for us to meet those obligations will, we insist, constitute confiscation. And that is exactly what the reduced tolls now established by the Commission will do, as we have shown by the concededly correct figures

which appear in said Appendix No. 2.

In our opening brief, we then approach the subject of wasting assets from a somewhat different angle, which, however, leads to the same conclusion. Leaving the field of stocks and bonds, we turn to the field of the investment. We turn to the number of dollars of money which were actually used in the construction of the two bridges, from whatever source the money may have been derived. Our problem is to determine whether the tolls heretofore charged, plus the reduced tolls now

established by the Commission, will yield sufficient revenue to enable the Company to pay all proper expense and a fair return on the unretired investment remaining, year by year, and retire said actual investment by 1948.

For a more detailed statement of the method used the Court is respectfully referred to pages 193-196 of our opening brief.

Attached to our opening brief as Appendix No. 4, is a tabulation entitled: "Wasting Assets—America Toll Bridge Company—Effect of Rates Prescribed by Railroad Commission on Company's Ability to Retir the Investment." By looking at the last figure in column 11, the Court will observe that, after making appropriate allowances for operating expenses, Federa and State income taxes and a return of only 8 per cer per annum on the unretired portion of the investment year by year, the tolls in effect prior to 1938, plus those established by the Commission for the remaining year will have failed to supply \$2,663,766 of the funds necessary to retire the investment by 1948.

By looking at the last figure in column 7, the Courwill note that if the rate of return of 9 per cent is taken said tolls will have failed, in a much larger sum, to supply the necessary funds for the retirement of the investment by 1948.

What do appellees say in reply to this showing of the retirement of the investment? by 1948? Nothing

at all.

Appellees have made no challenge of the accuracy of

any figure in said exhibit nor do we understand hor they could reasonably do so.

Nor do we know how appellees could hope to cha lenge successfully the methods used in the exhibit. The "stock and bond" exhibit (Appendix No. 3 to Opening Brief) and the "retirement of investment" exhibit (Appendix No. 4 to Opening Brief) are separate demonstrations along somewhat different lines, but leading to the same conclusion, namely, that the reduced tolls established by the Railroad Commission will fail in an amount in excess of \$2,500,000 to enable appellant to meet its obligations as owner of its "wasting assets."

Thus, again, is confiscation clearly demonstrated.

We submit, very respectfully, that the judgment should be reversed on each of the grounds set forth in our opening brief and in this reply brief.

Dated at Washington, D. C., this 20th day of April,

1939.

Respectfully submitted,

MAX THELEN,
Attorney for Appellant.

Due service and receipt of a copy of the within Reply Brief is hereby admitted this day of April, 1939.

Counsel for Appellees..



# FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 704

AMERICAN TOLL BRIDGE COMPANY, a Corporation,
Appellant,

28.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD AND LEON O. WHITSELL, AS MEMBERS OF AND CONSTITUTING THE RAILBOAD COMMISSION OF THE STATE OF CALIFORNIA.

STATEMENT OF APPELLEES OPPOSING JURISDIC-TION AND MOTION TO DISMISS OR AFFIRM.

IRA H. ROWELL,
RODERICK B. CASSIDY,
GEORGE E. HOWARD,
Counsel for Appellee,
Railroad Commission of the
State of California.

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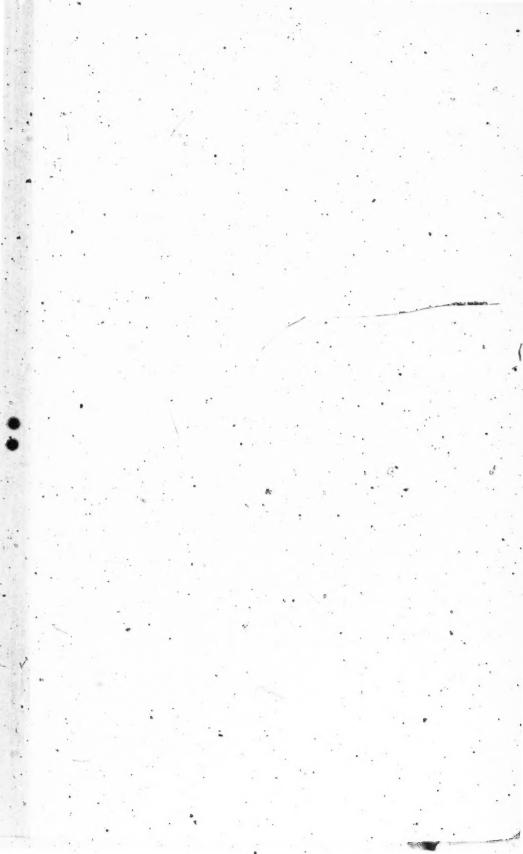






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# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1938

## No. 704

AMERICAN TOLL BRIDGE COMPANY, A CORPORATION,
Appellant,

RAILROAD COMMISSION OF THE STATE OF CALI-FORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,

Appellees.

## STATEMENT OF APPELLEES OPPOSING JURISDIC-TION AND MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 12, Paragraph 3, of Rules of Court, the appellees herein respectfully present their statement in opposition to the jurisdiction of the Court on the appeal in the above cause, and move the Court to dismiss the appeal or to affirm the judgment appealed from.

# Appellant's Assignment of Errors and Statement of Jurisdiction.

Concisely stated, the appellant declares in its assignment of errors and statement of jurisdiction that a con-

tract right has been impaired and its property taken by the judgment of the Supreme Court of the State of California (the opinion of the court appears as Appendix 5 to Statement of Jurisdiction), in that the court failed to find for appellant in its contentions, as follows:

- 1. That appellant possesses a county franchise to maintain a toll bridge over the Straits of Carquinez in the State of California, which franchise including the provisions of existing statutes," namely, Sections 2845 and 2846 of the Political Code, constitutes a contract prohibiting any public authority from reducing the tolls first fixed in that franchise, "unless it appears that said tolls are yielding a net return in excess of 15% on the rate base established by Sections 2845 and 2846 of the Political Code of the State of California." (Assignment 1; Statement of Juris., E-1.)
- 2. That an order issued by the appellee, the Railroad Commission of the State of California, reducing the tolls on said Carquinez Bridge, impaired such franchise contract in inlation of Section 10, Article I of the Constitution, and confiscated appellant's property in said bridge in violation of Section 1 of the Article XIV of the Constitution. (Assignments 1 and 2; Statement of Juris., E-2.)
- 3. That the Railroad Commission deprived appellant of due process of law and of the equal protection of the laws in that the "inevitable effect" of the reduction of tolls on the Carquinez Bridge would, by the "force of competition," compel appellant to make a similar reduction of tolls on another bridge owned and maintained by appellant at Antioch, California. (Assignments 5 and 7.)
- 4. That the Railroad Commission deprived appellant of due process of law in that it instituted an investigation into the rates of the Carquinez Bridge on its own motion, without the filing of a complaint or the making of charges

against appellant, and the Commission did not, prior to the decision rendered, advise appellant of the Commission's proposals. (Assignment 8.)

Presumably, therefore, the appellant presents its appeal on the theory that the rate-fixing order of the Railroad Commission constitutes a "statute," as that term is used in Section 344, Title 28, U. S. C. A., the validity of which statute appellant questions under the Constitution of the United States.

Such statute is not set forth in appellant's Statement of Jurisdiction, as required by Rule 12. Nor has the appellant set forth the alleged rate contract, or the statutory provisions upon which it relies to support its claim of contract right.

Therefore, in order to r ake the issue more clear, appelless will quote here the two sections of the Political Code to which appellant refers, as those sections read on February 5, 1923, when its franchise to build and maintain its Carquinez Bridge was obtained:

- "2845. The Board of Supervisors granting authority to construct a toll bridge or to keep a public ferry, must at the same time:
- "1. Fix the amount of a penal bond to be given by the person or corporation owning or taking tolls on the bridge or ferry for the benefit of the county and all persons crossing or desiring to cross the same, and provide for the annual renewal thereof;
- "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three nor over one hundred dollars per month, payable annually;
- "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the

actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year;

"4. Make all necessary orders relative to the construction, erection, and business of licensed toll bridges or ferries which they have by law the power to make The Board of Supervisors may, at any time they see fit, authorize and maintain fords across any water within any distance of any licensed toll bridge of ferry,"

"2846. The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the toll annually collected."

It should be noted that appellant does not challenge the authority of the Railroad Commission to fix its tolls. I contends merely (Assignment 6) that the Railroad Commission, when "stepping into the shoes of the Board of Supervisors," must follow "the rate making standard fixed and prescribed by the Legislature" in the above quoted section of the Political Code. Or, as appellant more specifically declares in its statement of jurisdiction (E-1), the Railroad Commission may not reduce the tolls "unless it appears that said tolls are yielding a net return in excess of 15% on the rate base established by Sections 2845 and 2846 of the Political Code."

## Contract Impairment Question is Not Substantial.

1-

It is submitted that the question of contract impairment is so unsubstantial upon its face as to require dismissal of the appeal.

There is no allegation that the county franchise of itself is a contract protecting appellant from rate changes during the term of the franchise. No statute is cited, other than the Code sections above, to indicate that the county supervisors were empowered to enter into a franchise rate contract.

Thus appellant relies upon the Code provisions alone to establish its claim both as to the existence of a contract and the terms of such alleged contract in respect to the rates and rate-making standards secured to appellant during the term of its franchise. Clearly, however, the Code provisiens do not read as appellant paraphrases them, nor can they possibly be construed to have the intent and meaning which the appellant asserts. To the contrary, just as the Supreme Court of California stated in its opinion, the claimed construction "fails to give full import to the language of the section which prohibits either an increase or a reduction in the tolls unless the receipts are shown to be disproportionate. The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with any intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much."

It is equally clear that the construction given to the prozions of the Political Code by the Supreme Court of the State of California reveals that the judgment from which the appeal has been taken was one based upon a non-Federal ground adequate to support such judgment.

## The Question of Confiscation is Not Substantial.

Nowhere in appellant's assignment of errors or statement of jurisdiction does appellant indicate why or how the claimed confiscation of its property results from the rate order issued by the Railroad Commission, except that appellant will not receive a return of 15 per cent upon what it terms the "rate base established by Sections 2845 and 2846 of the Political Code of the State of California."

The fact is, as the court's opinion fully explains, the Railroad Commission fixed rates to yield appellant  $7\frac{1}{2}$  per cent return upon the property value taken as a rate base. In the litigation below, appellant denied that the rates fixed would yield a return of  $7\frac{1}{2}$  per cent, but conceded that they would yield 6.6 per cent.

It is suggested in the assignment of errors that the Commission failed to recognize and give effect to the rights of appellant "in a wasting asset." On the contrary, the Supreme Court of California correctly states that the Commission, in computing the net annual receipts, made allow ances for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period.

### The Claimed Denial of Due Process is Not Substantial.

The appellant asserts that the entire procedure before the Railroad Commission constitutes a denial of due process of law, relying upon the case of *Morgan* v. *United* States, 304 U. S. 1.

The cited case bears no similarity at all to the one at hand. The actual facts as to the rate proceeding before the Railroad Commission are revealed in the opinion of the State court. The proceeding was initiated in the usual manner by an order instituting an investigation into the

resonableness of appellant's rates. Evidence was taken before a Commissioner without limitation. Appellant submitted the matter for decision without argument. The Supreme Court accorded a full judicial review of the Commission's order, and stayed the operation of the order pending final determination of the cause.

WHEREFORE it is respectfully submitted, and the appellees so move the Court, that the appeal from the judgment of the Supreme Court of the State of California be dismissed, of the judgment of that court be affirmed.

IRA H. ROWELL,
RODERICK B. CASSIDY,
GEORGE E. HOWARD,
Counsel for Appellee,
Railroad Commission of the
State of California.



Supreme Dourt, U. S.

APR 17 1939

## In the Supreme Lin

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United States

OCTOBER TERM, 1938

No. 704

AMERICAN TOLL BRIDGE COMPANY, a Corporation,

Appellant,

VS.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
WALLACE L. WARE, FRANK R. DEVLIN, RAY L.
RILEY, MAY C. WAKEFIELD, and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California,

Appellees.

## BRIEF FOR APPELLEE.

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Railroad Commission of the State of California,



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# In the Supreme Court

OF THE

## Anited States

OCTOBER TERM, 1938

No. 704

AMERICAN TOLL BRIDGE COMPANY, a Corporation,

Appellant,

VS.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD, and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California,

Appellees.

## BRIEF FOR APPELLEE.

#### STATEMENT OF THE CASE.

This appeal is from a judgment rendered by the Supreme Court of California on September 27, 1938 (R. 122; 96 Cal. Dec. 367), affirming a decision and order of the Railroad Commission of California entered February 8, 1938 (R. 31) prescribing the rates or tolls which should be charged by appellant, American Toll Bridge Company, in

the operation of its toll bridge across the Straits of Carquinez at the upper portion of San Francisco Bay.

The errors assigned (R. 197), although eight in number, may fairly be reduced to three contentions as follows:

1. That appellant possesses a franchise granted by the Board of Supervisors of the County of Contra Costa, California, to maintain and operate a bridge over the Straits of Carquinez, which franchise, "including provisions of existing statutes", namely, sections 2845 and 2846 of the Political Code of California, constitutes a contract protected against impairment by section 10, Article I of the Constitution, should the Railroad Commission of California or any public authority attempt so to reduce its rates as to conflict with the terms of these Political Code sections. Appellant's claimed construction of the Code provisions is that tolls may not be reduced unless it first appear that existing tolls are yielding an annual return in excess of 15 percent upon a rate base established in such manner as the Code provides.

In reply to this contention, we shall show presently that the alleged rate contract does not exist in fact, and that no power was possessed by either the County Board of Supervisors or by the Legislature itself to make any such rate contract which might not be subject to revision or repeal.

2. That appellant has been denied a right guaranteed by the Fourteenth Amendment of the Constitution of the United States in that the action of the Railroad Commission of California prescribing bridge tolls did not conform to the requisites of due process in a procedural sense. This assertion is based upon the ground that the Commission instituted an investigation as to the reasonableness.

of tolls without filing a specific complaint; did not, prior to the decision rendered, advise appellant of its proposals; did not make requisite findings; and that the Commission's action prescribing tolls for the Carquinez Bridge alone would have the "inevitable effect", "by force of competition", of reducing tolls upon another bridge owned and perated by appellant known as the Antioch Bridge

In reply to these contentions we shall show that there is no legal or equitable basis for such claimed violation of the due process clause, either in the procedural steps taken by the Commission to prescribe tolls, or in the judicial review of the Commission's action thereafter accorded appellant. It will be demonstrated also that there has been no failure of due process in a substantive sense.

3. That the Commission's rate order is confiscatory of appellant's property in both said bridges.

In reply to this charge it will be shown that the Commission allowed and correctly estimated a rate of fully 7½ percent upon the value of the Carquinez Bridge property, after making provision for all expenses of operation and expense for the full depreciation of property within the franchise period.

#### THE PROCEEDINGS BELOW.

In 1937 the Legislature of California amended Section 2(dd) of the Public Utilities Act (Statutes 1915, p. 115, as amended; Deering's General Laws of 1937, Act 6386, p. 3119), to add the italicized words in the paragraph following:

"The term 'public utility', when used in this act, includes every common carrier, toll-bridge corporation.

pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof. (Amended 1937, ch. 896.)"

The said Public Utilities Act empowers the Railroad Commission to fix reasonable rates applicable to all classes of utilities therein designated, and otherwise to regulate their operations. The above mentioned amendment became effective August 27, 1937.

The Railroad Commission thereupon instituted, upon its own motion, an investigation sufficiently broad in its scope to include the reasonableness of the rates as well as the practices and facilities of the four private toll bridges within the State. (R. 27.) The American Toll Bridge Company was named as a respondent and as the owner and operator of two such bridges, the Carquinez and Antioch bridges.

Later, on October 4, 1937, the Commission, upon its own motion, instituted a separate investigation into the reasonableness of the rates charged by the American Toll Bridge Company on the Carquinez Toll Bridge. (R. 30.)

Thereupon, the two cases thus instituted by the Commission were set for hearing before one of the five members of the Railroad Commission. The American Toll Bridge Company appeared. It made no objection whatever to the jurisdiction of the Commission to proceed in either case, but stated that it believed it equitable that the rates of its Carquinez Bridge be not considered separately but in conjunction with the rates of its Antioch Bridge, and,

accordingly, it presented a motion to that effect. (R. 203-207.)

A large record was then made. Evidence was directed to the subjects of property value, revenues, expenses and needed return. At the conclusion of hearings, the matter was submitted for the Commission's decision without further argument or filing of briefs. (R. 530.)

The Commission's decision (R. 31-40) was directed to the evidence thus presented. Its order prescribed reductions in rates for the Carquinez Bridge alone.

From this decision and order the American Toll Bridge Company sought a rehearing (R. 40), as the Public Utilities Act provides must be done if the right to obtain a judicial review is to be preserved. (Public Utilities Act, supra, secs. 66, 67.) It was in that petition for rehearing that the claim of a franchise contract right to have its tolls not diminished at all unless it should appear that they yielded a return in excess of 15 percent was first declared. The Commission denied a rehearing.

Upon petition then presented by appellant to the Supreme Court of California for a review of the Commission's order, the Court granted the petition, and suspended enforcement of the Commission's order pending review. The entire record made before the Commission was filed with the Court. The matter was fully briefed and orally argued. The Court's opinion (R. 122-141) fully affirmed the Commission's action in respect to the reasonableness of the rates fixed for the Carquinez Bridge as well as its action in refusing to include the Antioch and Carquinez bridge properties together as a single rate-making unit. And the Court rejected appellant's plea that its alleged franchise rate contract had been impaired.

## IMPAIRMENT OF CONTRACT.

It seems perfectly clear that the State action or statute which appellant asserts to have resulted in an impairment of its alleged contract is the rate-fixing order of the Railroad Commission. It is not the legislative act giving to the Commission the power to regulate its rates. Appellant does not deny that the Commission has some jurisdiction over its rates. It is conceded that the board of supervisors of the county which granted its bridge franchise possessed such rate-fixing power.

But appellant does contend that the Legislature had conferred upon county boards of supervisors only a limited power to regulate toll bridge rates; that by virtue of certain provisions of the Political Code, the counties could not fix rates unless the earnings exceeded 15 percent annually upon a valuation ascertained by the prescribed formula set forth in the Code. Such claimed statutory limitations upon the regulatory powers formerly committed to counties, existing at the time appellant obtained its franchise from the County of Contra Costa, are alleged to continue now to circumscribe the Railroad Commission since the Legislature transferred the rate-making authority from the counties to the Commission.

But let it be made entirely clear that it is not such franchise itself which appellant asserts to constitute a rate contract. That franchise (R. 269-277), it is true, did mention the rates to be charged, but the franchise also declared that the Railroad Commission should fix the rates. The franchise on its face does not purport to be a rate contract.

So it must be perfectly evident that the contract which appellant asserts to be impaired is nothing more than the claimed right to demand that the Legislature shall not, at any time during the franchise period of twenty-five years, alter the general laws respecting public control of toll bridge rates.

With this preliminary analysis of appellant's claim of contract impairment, let us examine more closely the exact statutory provisions upon which it relies.

#### SUMMARY OF CODE PROVISIONS RELATING TO TOLL BRIDGES.

Before the Supreme Court of California, and now before this Court, appellant cites and relies upon just two sections of the Political Code of California, sections 2845 and 2846. It quotes such sections as they stood on February 5, 1923, when the Carquinez Bridge franchise was granted to its predecessor, the Rodeo-Vallejo Ferry Company, as follows:

"Sec. 2845. The board of supervisors granting authority to construct a toll-bridge or to keep a public ferry, must at the same time:

- "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three nor over one hundred dollars per month, payable annually.
- "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor

on the fair cash value together with the repairs and maintenance thereof for any succeeding year." (Italics supplied.)

"Sec. 2846. The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the Board of Supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry. The license tax fixed by the Board of Supervisors must not exceed ten per cent of the tolls annually collected."

Let it be pointed out that the above quoted Code sections upon which appellant relies as creating a contract obligation upon the part of the State, remained unchanged since the time of the adoption of the Codes in 1872. We presently shall call attention to earlier statutory precedents with which these Code provisions may be compared. They must be considered, also, in the light of associated sections contained in Chapter IV of the Political Code applicable to "public ferries and toll-bridges". Three of these at least should here be quoted.

"Sec. 2848. Whenever the board of supervisors are about to fix the license tax and rate of tolls on a bridge or ferry they must make inquiry into the present actual cash value and the cost of all necessary repairs and maintenance thereof, and for that purpose may examine, under oath, the owner or keeper of the same, and other witnesses, and the assessed value of the bridge or ferry on the assessment-roll of the county. When the estimate of the board is made,

if the same is not agreed to by the owner or keeper of the bridge or ferry, the same must be fixed by three commissioners, one to be appointed by the board of supervisors, one by the owner and keeper, and the third by the county judge, who must hear testimony and fix such value and cost according to the facts, and report the same to the board of supervisors under oath. In all estimates of the fair cash value of the bridge or ferry the value of the franchise must not be taken into consideration."

"Sec. 2849. When the cost of construction or erection and equipment of the bridge or ferry, or the fair cash value thereof, together with the cost of needed repairs and the conduct and maintenance of the same, is ascertained and fixed for the preceding year, the board must on such ascertained amount fix the annual license tax rate of tolls, and the amount of the penal bond, and direct a license to be issued by the clerk."

"Sec. 2878. \* \* \* When a bridge is completed, and a certificate that it is so, and is safe and convenient for the public use, is signed by the commissioner of highways or president of the board of supervisors, and filed in the county clerk's office in the county or counties in which it is located, the directors or owner may erect a toll-gate at such bridge and require such tolls as the boards of supervisors of the county or counties from time to time prescribe. \* \* \* . ''

### LEGISLATIVE HISTORY OF CODE SECTIONS.

The legislative background of the above Political Code sections relating to toll bridge franchises may be traced to general statutes enacted as early as 1850. We should

refer to some of these, beginning with the Statutes of 1855, page 183, wherein it is provided that:

"The Board of Supervisors shall establish the rates of toll to be charged and received for crossing all licensed ferries and toll bridges, • • • "."

Thereafter, by Statutes of 1862, page 247, the following was enacted:

"Sec. 1. The Board of Supervisors of each county of this State shall have the power to grant a license to construct a toll bridge across any unnavigable stream in their county, and for using and maintaining such bridge for a period not exceeding ten years; and said Board shall have the power to prescribe the rates of toll, and change the same from year to year, as in their discretion may seem proper; but shall not fix them so low as to make the net income less than fifteen per cent per annum upon a fair valuation of such bridge. \* \* All the provisions of the Act to which this is supplemental, except that which limits to one year the terms for which a license may be granted for a toll bridge, shall apply to all grants under this Act."

Then, by Statutes of 1863, page 720, there was an amendatory act reading as follows:

"Sec. 1. The Board of Supervisors of each county in this State shall have power to grant a license to construct a toll bridge across any stream, not navigable, in their county, and for using and maintaining such bridge for a period not exceeding twenty years, or to grant a license to keep, use and maintain a public ferry across any river or stream, for a period not exceeding ten years; and said Board shall have power to prescribe the rates of toll, and change the

And again, even on the very next day (Statutes of 1863, p. 758), the Legislature amended Section 19 of the Act of 1855, above quoted, to read as follows:

"Sec. 19. The Board of Supervisors shall establish the rates of toll to be charged and received for crossing all licensed ferries and toll bridges, but such tolls shall not be fixed at a rate so low as to make the net income to the owners thereof less than twenty-four per cent per annum on the assessed taxable value of such ferry or toll bridge, and such rates shall be posted up, either written, printed, or painted, at each licensed ferry or toll bridge in the State, by the owner thereof. " "."

And once again, before the codification of the laws in 1872, the Legislature (Statutes of 1869-70, p. 887) amended Section 1 of the acts of 1862 and 1863, above quoted, to read as follows:

"Section 1. The Board of Supervisors of each county in this State shall have power to grant a license to construct a toll bridge across any stream, creek or slough in their county, and for using and maintaining such bridge for a period not exceeding twenty years, or to grant a license to keep, use and maintain

a public ferry across any river or stream for a period not exceeding twenty years; and said Board shall have the right to prescribe the rates of toll, and change the same from year to year, as they may think proper but previous to the first day of January, eighteen hundred and seventy-three, they shall not fix the rates of toll over any bridge or ferry constructed or licensed under the provisions of this Act so low as to make the net (income) less than twenty per cent. per annum upon a fair valuation of such bridge or ferry and franchise, and thereafter, not less than ten per cent. per annum upon such valuation, which shall be made at the time in each year when such tolls are fixed.

## THE LANGUAGE OF THE CODE SECTIONS IS THAT OF REGULATION AND NOT OF CONTRACT.

The brief references above made to the various Code sections and to their legislative precedents sufficiently demonstrate a legislative intent to empower boards of supervisors continuously to regulate toll bridge rates.

Contrary to appellant's contention that the adoption of the Codes of 1872 definitely established a policy of contract, the language of the Code provisions would indicate a substantial change in the policy manifested in preceding statutes. Whereas the earlier laws definitely had directed the boards of supervisors not to fix rates prior to the year 1873 "so low as to make the net income less than twenty per cent", and thereafter "not less than ten per cent" per annum, it may be seen that Section 2845(3) of the Code of 1872 merely directed the supervisors to fix tolls "which

must not raise annually an income exceeding fifteen per cent? The earlier statutes therefore prescribed a minimum rate of return below which the supervisors could not go. But the Code of 1872 prescribed a maximum rate of return which the supervisors might permit.

Thus, just as the Supreme Court of California held, the very Code sections relied upon by appellant to create some sort of a contract right to be protected from rate control except when its bridge earnings exceed fifteen per cent per annum, must be given a strained interpretation indeed if those sections be taken as a promise by the State never to act otherwise.

We believe it unnecessary to extend further this analysis of the legislative intent revealed in the Code provisions. Summarizing, we believe the following conclusions are self-evident:

- 1. In the Codes of 1872, and in all the legislative acts preceding the Codes, there clearly was manifested an attempt to subject toll bridges to continuing regulation. There is no indication that there was delegated to county boards of supervisors the power to make a rate contract, mutually binding, to suspend for a term of years whatever continuing rate-making power the Legislature had given to such boards.
- 2. Neither the Codes of 1872 nor the preceding statutes prescribed a definite or uniform method for the ascertainment of the base value upon which the rate of return should be calculated, or the costs of operation to be allowed.

3. There is no evidence that the rate of return of 15 percent mentioned in the Code as a maximum rate for toll bridges was intended to place toll bridge companies in a class set apart from other grantees of public franchises. On the contrary, there is every evidence that the intent revealed in the statutes even prior to the Codes was merely to declare a policy that would permit to toll bridges as well as other classes of utilities a fair rate of return measured by the monetary standards of the time. We might refer, for example, to the Canal Company Act of 1862 (Stats. 1862, p. 541) which provided that rates "shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested".

EVEN ASSUMING A LEGISLATIVE ATTEMPT TO PERMIT COUNTIES TO ENTER INTO RATE CONTRACTS, THE LEGISLATURE WAS PROHIBITED BY CONSTITUTIONAL MANDATE FROM GRANTING SUCH AUTHORITY.

The Supreme Court of California, in the judgment here appealed from, held not only that the alleged contract was not to be found in the language of the Code provisions relied upon by appellant, but that the State Constitution expressly reserved a right in the Legislature to repeal or alter such laws, the Court referring to Article IV, Section 31 of the Constitution of 1849, and to Article XII, Section 1 of the Constitution of 1879.

The cited constitutional provision has always read:

" \* All laws now in force in this State concerning corporations and all laws that may be hereafter

passed pursuant to this section may be altered from time to time or repealed."

We presently shall refer to decisions of this Court construing that provision of the State Constitution to prevent the Legislature from bartering away its regulatory powers. And we also may quote the provision of Article I, Section 21 of the Constitution of 1879, which even more strongly provides for the legislative alteration of such laws. This provision reads as follows:

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, • • •."

THE DECISIONS OF THIS COURT IN CASES ARISING IN CALI-FORMIA HAVE BEEN DIRECTLY CONTRARY TO APPEL-LANT'S CONTENTION.

The appellant refers to many cases holding that a State may authorize one of its municipal subdivisions to establish utility rates by contract. This, of course, is not to be disputed. But such a contract must appear in plain and unambiguous language, and the power to make it must clearly appear.

There have been two decisions by this Court involving the powers of county boards of supervisors of California to enter into contracts with grantees of franchises, and in each it was held that both the contract and the power to make it were non-existent. Those two cases being so closely parallel to the one at bar, they should be referred to here at some length.

#### SPRING VALLEY WATER WORKS v. SCHOTTLER (1884), 110 U. S. 347.

The contending utility in that case was organized under the general law of April 22, 1858, for the incorporation of water companies. The act provided that the board of supervisors might prescribe proper regulations for the delivery of water, but rates should be fixed by five commissioners, only two of whom were to be selected by the supervisors and two by the company, and those four should a choose a fifth member.

By Statutes of 1881, page 54, the rate-making power was transferred to the municipal or county legislative body. Thereupon, the supervisors of the City and County of San Francisco expressed their intention of proceeding directly to fix rates, and refused to cooperate in the appointment of rate commissioners.

The Water Company having challenged this action by mandate proceeding, the matter came before the Supreme Court of California in Spring Valley Water Co. v. Supervisors (61 Cal. 3). The State Court held that the statutory provision did not constitute a contract. On appeal, that judgment was sustained by this Court.

Although the issue thus raised was not whether there existed a rate contract for the duration of the franchise, it was the contention that the rate-fixing method prescribed in the earlier statute constituted a contract not subject to impairment. And that is substantially the issue in the instant case.

On this question the Supreme Court of California declared:

"\* No property, tangible, or intangible, of the company has been interfered with. The water which

it is engaged as a business in selling to the public is regarded and protected by law as its property; but, as property, which has been devoted to the use of the public, it is subject to the regulation and control of the State; and the State, while it has sanctioned the use, has a duty to discharge to the public by regulating the use, as well as the powers and privileges of the corporation incidental to the use. These things are not of the contract; they appertain to the sovereignty of the State, and can not be bargained away." (61 Cal. 8.)

Then, in the decision of this Court affirming the judgment below, it was said (110 U. S. 353):

One of the obligations the Company assumed was to sell water at reasonable prices, and the law provided for a special commission to determine what should be deemed reasonable both by the consumers and the Company, but there is nowhere to be found any evidence of even a willingness to contract away the power of the Legislature to prescribe another mode of settling the same question if it should be considered desirable. In the Sinking Fund Cases, 99 U. S. 721, it was said that whatever rules for the government of the affairs of a corporation might have been put into the charter when granted could afterwards be established by the Legislature under its reserved power of amendment. Long before the Constitution of 1879 was adopted in California, statutes had been passed in many of the States requiring water companies, gas companies and other companies of like character, to supply their customers at prices to be fixed by the municipal authorities of the locality; and, as an independent proposition, we' see no reason why such a regulation is not within the scope of the legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not is a question for the Legislature, not the courts."

- 1849, prohibited one Legislature from bargaining away the power of succeeding Legislatures to control the administration of the affairs of a private corporation formed under the laws of the State. Of this legislative disability, the Spring Valley Company had notice, when it accepted the privileges of the Act of 1858, and it must be presumed to have built its works and expended its moneys in the hope that neither a succeeding Legislature, nor the people in their collective capacity when framing a Constitution, would ever deem it expedient to return to the old mode of fixing rates, rather than on any want of power to do so, if found desirable. \* \* . " (110 U. S. 355.)
- Neither are the chartered rights acquired by the Company under the law to be looked upon as contracts with the City and County of San Francisco. The Corporation was created by the State. All its powers came from the State and none from the city or county. As a Corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may, from time to time, be made by proper authority. The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was & condition attached to the franchises conferred on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal." (110 U. S. 356.)

COUNTY OF STANISLAUS v. SA., JOAQUIN & KINGS RIVER CANAL & IRRIGATION COMPANY (1904), 192 U. S. 201.

This case bears a striking similarity to the one at bar. The canal company was incorporated in 1871 under the Statutes of 1853, as amended in 1862, reading in part as follows:

"Every company organized as aforesaid shall have power, and the same is hereby granted, • • • to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than 1½ per cent per month upon the capital actually invested."

On March 12, 1885, page 94, the Legislature provided as follows:

"Said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof \* \* shall be not less than 6 nor more than 18 per cent upon the said value of the canals. \* \* and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; \* \* ."

On June 24, 1896, the county supervisors adopted an ordinance prescribing the rates for the ensuing year which were estimated to yield a 6 percent return. A bill for an injunction was filed in the Circuit Court of the United States, Northern District of California, and a decree entered holding the Act of 1885 constituted an impairment of contract. (113 Fed. 930.) On appeal to this Court,

the decree below was reversed. The following quotations from this Court's opinion are particularly pertinent here:

"First. The question which first arises in this case is whether there was a contract with the company under the Act of 1862, by reason of which the state could not thereafter authorize the board of supervisors to reduce the rates so low as to yield less than 1½ per cent per month upon the capital actually invested."

"It seems to us that language of this nature cannot properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when, in the judy cent of the legislature, it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to 11/2 per cent per month upon the capital actually invested, might, in the course of years, become exceedingly burdensome to those who used the water, and amount to a very unreasonable compensation to the company for the water it sold. Irrigation by means of corporations formed to supply water was in its infancy in 1862 in California, and the risks necessarily taken in the organization of such companies, and the prosecution of their work, were then not only very large, but also extremely uncertain in character. Consequently, a rate of compensation was proper at that time which, in the course of years and the accumulated experience as to the necessary cost of such works, and of their successful operation, including the consideration of the risk attendant upon their operation, would make a water rate. as provided by the act of 1862, a very unreasonable overcharge. These facts must have been present in the minds of those who enacted the legislation of 1862. and it would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the state in regard to all companies organized under the act of 1862, and before the passage of the act of 1885.

"The authority given by the act of 1862 enabled the board of supervisors to conditionally regulate the rates. There is no promise made in the act that the legislature would not itself subsequently alter that authority. The state simply authorized its agents, the boards of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the state might not thereafter authorize the boards to reduct them, or that it might not itself do so directly. Even as between individuals, such an implication would not be a reasonable one from the language used, and as the contract, if it existed, would take away from the legislature its otherwise undoubted right of regulation upon a subject of great public importance, there is still less reason for implying a contract which would prevent the state from using its power to that end for the future. The language of this portion of the act applies to the boards. and limits their right of reduction leaving unhampered the right of the state to interfere directly or by authorizing the boards to reduce the rates below the point stated in the act. In order to make such a contract the language must be plain, and susceptible of no other reasonable construction. Freeport Water Co. v. Freeport City, 180 U. S. 587-599, 45 L. ed. 679-688, citing Railroad Commission Cases, 116 U.S. 307-325. 29 L. ed. 636-642." (Italies supplied.)

"In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it. The cases heretofore decided in this court are authority for this view. " (Italics supplied.)

"Second. But, assuming there was a contract, we think the rates could be changed under that provision of the Constitution of the State adopted in 1849, article 4, sec. 31 ..." (192 U. S. 211.)

"" In reiterating this view of the power, we think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not prohibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 as to provide for the fixing of rates as set forth in the act of 1885." (Italics supplied.)

Thus, even though the California statute under consideration had imposed a minimum rate limitation upon the county board of supervisors, this Court held there was no contract and could be none. It was a statute imposing the same rate-making limitation as was imposed upon county supervisors by the toll-bridge acts prior to 1872, thus giving rise to a far stronger claim of contract impairment than can arise from Section 2845 of the Political Code of 1872 telling the supervisors that they may fix rates "which must not raise annually an income exceeding fifteen per cent".

There were two other cases coming to this Court from California involving the power of municipalities to enter into rate contracts. In each it was held the cities had no such power. (Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265; Railroad Commission v. Los Angeles Railway Corporation, 280 U. S. 145.)

One other case arising in California, Los Angeles v. Los Angeles City Water Company, 177 U. S. 558, upon which appellant seems to rely heavily, held that in the year 1868 the City of Los Angeles had the power to enter into a rate contract, this view being taken in the light of the State Court decisions as they then read. But the facts were very different from those in the other cases above cited and in the case here. The city had leased its own water works for an annual consideration, as well as granting a franchise for extensions of the water system. The language of the agreement was the language of contract. And as this Court thereatter said in the Home Telephone & Telegraph case (211 U. S. 265, 276), "the contract was in specific terms ratified and confirmed by the Legislature".

It must be patent, therefore, that the judgment of the Supreme Court of California from which this appeal is taken was exactly in conformity with the holdings of this Court in parallel situations.

And those cases are not unique in any way. They are exactly in line with so many other rulings of this Court that it seems unnecessary to do more here than merely mention some of them.

The Court's attention should be directed to its recent action in dismissing an appeal taken from a decision by the Supreme Court of New Hampshire upholding the power of that state to regulate toll bridge rates against the claim of a rate contract impairment, namely, Stearns v. Lorenz, 287 U. S. 565. The case below was Lorenz v.

Stearns, 85 N. H. 494, 161 Atl. 205, the state court holding the statute governing the right to charge tolls according to a specified schedule was not to be considered as a contract, and, if it could be so construed, it was alterable under the reserved power expressed in the state constitution.

Were other authorities necessary upon the proposition that a state by constitutional provision may reserve the power to alter or repeal laws respecting franchise privileges, the following cases should suffice:

Shields v. Ohio, 95 U.S. 319, 324;

Central Pac. v. Gallatin, 99 U. S. 727, 730, 731;

Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 98, 104;

Peoples Gaslight Co. v. Chicago, 194 U. S. 1, 9;

San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 306, 308;

Fair Haven etc. Ry. Co. v. New Haven, 203 U.S. 379, 388, 389:

Louisville & Nashville R. Co. v. Garrett, 231 U. S. 298, 316;

Puget Sound Traction Co. v. Reynolds, 244 U.S. 574, 579.

The cases expressing the general principle of strictest statutory construction where a claim is made of contract impairment are so numerous as hardly to require citation. As was said in Wheeling & Belmont Bridge Company v. Wheeling Bridge Company, 138 U.S. 287, 293:

power of government respecting any matter of public concern must be shown by clear and unequivocal lan-

guage; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

Not only must the power to make the contract be clear and unequivocal, but the words of the statute or ordinance itself must be such as to compel the conclusion that a contract was intended and consummated. Thus, a mere limitation placed upon the power of a rate-making authority, whether the limitation be the prescription of maximum or minimum rates, does not of itself give rise to a contract obligation.

Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578, 588;

Freeport Water Co. v. Freeport, 180 U. S. 587, 600; County of Stanislaus v. San Joaquin & Kings River Canal & Irrig. Co., 192 U. S. 201, 207;

Wyandotte County Gas Co. v. Kansas, 231 U.S. 622, 629.

And it is clear, also, that this Court quite properly has ever een inclined to accept the judgment of a state court in the construction of the laws of such state. As was said in Milwaukee Electric Railway & Light Co. v. Railroad Commission of Wisconsin, 238 U.S. 174, 184:

"In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we

reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed."

Before concluding this subject of claimed contract impairment, we should reply particularly to one point seemingly pressed by appellant to the effect that the Carquinez Bridge franchise, secured by its predecessor in interest from the County of Contra Costa on February 5, 1923, was expressly ratified by a legislative act on May 8, 1923. There need be no misunderstanding as to the meaning and purpose of the legislative action thus referred to. It was an amendment to Section 2872 of the Political Code reading as follows:

quent to the fourteenth day of March, A. D. one thousand eight hundred eighty-one for the construction of any such bridges across the Sacramento or San Joaquin Rivers, the Suisun Bay, or Carquinez Straits, the Petaluma, Napa or Sonoma Creeks, whether above or below the head of navigation of said waters or streams, are hereby ratified, approved, confirmed and made valid for all purposes; provided however, that nothing herein contained shall be construed to extend the term of any such license or franchise beyond the period fixed in the order granting the same, or to revive any license or franchise which has lapsed for non-user, or to restore any license or franchise which has been forfeited."

This Act, it is true, was a ratification of the franchise otherwise questionable as to its duration because of the possible lack of authority of the board of supervisors to grant such a franchise for twenty-five years. But the Act lends not the slightest aid to appellant's contention that

the franchise created a contract, or that either the county or the Legislature possessed the power to barter away the power to regulate the bridge tolls. It is a very different situation from that existing in the Los Angeles City Water Company case (177 U. S. 558), above referred to, where a contract in specific terms was specifically ratified by the Legislature. Moreover, had there actually been a specific ratification, that fact would add nothing to appellant's case, for appellant does not contend that the franchise itself purports to be or constitutes the alleged contract. It finds its alleged contract in the Code provisions alone, and the Legislature has never expressed itself as sanctioning a construction of the Code for which appellant contends.

Let us also mention briefly the further point urged by appellant to the effect that the Supreme Court of California had theretofore held the ordinance granted by the County of Contra Costa to constitute a binding contract. The decision referred to (County of Contra Costa v. American Toll Bridge Co., 10 Cal. (2d) 359) cannot be taken to have any such significance. It held merely that county boards of supervisors had the power to provide in a toll-bridge franchise for the payment by the grantee of a two percent gross revenue fee, this power being derived from various Code provisions, and a power constantly exercised when granting franchises to all classes of public utilities. No question of contract to be free from rate regulation was there involved.

#### PROCEDURAL DUE PROCESS.

Appellant's claimed error below under the heading of "Procedural Due Process" seems to be rested upon this Court's two decisions in *Morgan v. United States*, 298 U. S. 468, and 304 U. S. 1. Certainly, there is little similarity between that case and the instant one.

#### THERE WAS FULL COMPLIANCE WITH THE REQUISITES OF DUE PROCESS, AS TO NOTICE, HEARING, AND CONSIDERA-TION.

Let us consider briefly what appellant finds in the procedure before the Railroad Commission or before the Court below to constitute an alleged failure of due processof law. There was, it says, no complaint or answer before. the Commission, no oral or written argument, and no service of proposed findings before issuance of the final command. The fact is that none of these things was ever demanded or even mentioned by the appellant during the course of the proceedings before the Commission. The fact is that appellant expressly waived opportunity to argue or brief the case. (R. 530.) There is no intimation anywhere that it was foreclosed from producing any evidence desired. There is no charge that the Commission itself did not consider the evidence received at the hearings before one of the Commissioners, just as the statute authorized. True, appellant was not served in the beginning with a complaint alleging that its rates were deemed unreasonable by the Commission, or specifically alleging the many facts which necessarily would be developed during the course of such a rate proceeding, for, obviously, the Commission and not rightfully prejudge

the situation before investigation and hearing. We can discover no allegation anywhere that appellant did not know exactly what the issues were. It does not say anywhere that the Commission decided the case upon facts not in evidence. And there is no charge that thereafter it was not accorded the fullest judicial review of the Commission's action, with a stay of the rate order pending such review.

It is submitted, therefore, that there is no indication whatever of failure of due process in so far as that phrase of the Constitution has been held to govern the procedural steps of either administrative or judicial action.

#### THERE WAS NO INADEQUACY OF FINDINGS BY THE COMMISSION.

But what appellant further asserts to amount to failure of procedural due process is the alleged failure of the Railroad Commission to make adequate findings of fact. It is not alleged that appellant has suffered any disadvantage thereby. It is not claimed that the asserted findings are required by law. Nor is it alleged that the Supreme Court of California in any way misinterpreted the facts because of the asserted failure of findings.

What appellant here complains of cannot be a failure of due process in a procedural sense. So we believe that reply can best be made thereto by examining appellant's claim of confiscation, the subject next to be considered. Likewise, the charge that the Commission arbitrarily separated the two bridges owned by appellant may more appropriately be examined in the same connection.

#### CONFISCATION OF PROPERTY.

Appellant asserts that as a result of the Commission's rate order its property in both bridges has been confiscated.

It declares that the minimum figure to represent the value of the Carquinez Bridge is \$8,632,622.46; that the net annual revenue from the operation of that bridge for the year 1938 under the rates fixed by the Commission would have been \$570,298.00; and the resultant rate of return 6.6 percent. It seemingly demands a return of 9 percent to avoid confiscation.

Appellant claims further that the inevitable effect of the rate order on the Carquinez Bridge is to confiscate its property in the Antioch Bridge. It says that the minimum value of both bridges is \$10,780,411.00 and that the combined earnings of \$606,320.00 would yield a return of only 5.6 percent.

It will be shown presently that the Railroad Commission fixed rates for the Carquinez Bridge alone to yield in excess of 7½ percent on a value of \$7,949,954.00. So we should first examine the claim that the Carquinez and Antioch bridges must be regarded as a single property for rate-fixing purposes.

## THE CAPQUINEZ BRIDGE IS LEGALLY AND EQUITABLY A DISTINCT RATE-MAKING UNIT.

It is essential that the history of appellant's two bridges, be fully understood.

The American Toll Bridge Company was organized as a Delaware corporation on May 28, 1923. (R. 209.) It

has always been controlled by the American Toll Bridge Company of California, another Delaware corporation simultaneously organized. (R. 210.)

The organizers of these corporations were the officials of the Rodeo-Valleje Ferry Company, a cempany which for some time had been operating a ferry service at approximately the location of the Carquinez Bridge as later constructed. (R. 209, 358.) The Rodeo-Vallejo Ferry Company applied to the supervisors of the County of Contra Costa on September 19, 1922, for a franchise to build a bridge at the Carquinez Straits. There were four other applicants for similar bridge franchises, two with "very powerful backing", and the opposition of these rivals and of other interests to the Rodeo-Vallejo Ferry Company's application resulted in a "great deals of expense in litigation and in other ways and many delays". (R. 360.) The Rodeo-Vallejo Ferry Company obtained a franchise February 5, 1923.

The County of Contra Costa also granted a franchise for the construction of a bridge at Antioch about twenty-five miles above the Straits of Carquinez. This was granted to the Delta Bridge Corporation on June 4, 1923. (R. 210.)

After the County of Contra Costa had thus granted the two bridge franchises, the American Toll Bridge Company acquired both franchise rights, and thereafter began the construction of both bridges. (R. 210.) It has continued to own and operate both bridges since their completion.

Intermediate the Carquinez and Antioch bridges there existed a ferry service operated by the Martinez-Benicia Ferry Company. This the American Toll Bridge Company

purchased in 1928 and has since continued to operate. (R. 231, 475.) It also purchased a ferry franchise from one Lauritzen to operate a ferry near the Antioch Bridge. (R. 452.)

The appellant, American Toll Bridge Company, earnestly contends that these two bridges should be considered together as a single rate-making unit. It makes this plea, of course, because the Antioch Bridge has been far less profitable than the Carquinez Bridge. And it says that the effect of a reduction of rates charged for crossing the Carquinez Bridge will compel a similar lowering of its tolls upon the Antioch Bridge, with consequent loss of revenue thereon. Strangely, it does not claim that its ferry property should likewise be considered a part of its so-called transportation system.

The equity of appellant's claim in this respect was considered fully by the Supreme Court of California and found wanting. The judgment of the lower Court, fully informed, may not well be questioned unless its action was contrary to established precedents in like situations. We submit that such precedents do not exist.

"The toll bridge company", the State Court said (R. 131), "purchased and operated the competitive factors for the obvious purpose of reducing competition, and it has undoubtedly succeeded in accomplishing that end. It cannot expect more." The Court might well have added that this Court has said many times that the due process clause of the Constitution does not protect public utilities against the hazards of competition. (Public Service Commission

Appellant, at page 116 of its brief, unfairly refers to the quoted words a stating that it purchased "both bridges."

of Montana v. Great Northern Utilities Company, 289 U. S. 130, 135.) Appellant here candidly states that it is the competition between the two bridges which compels the rate-making authority to treat them as one, and this admitted competition, moreover, was wholly off-imposed, even to the extent of operating a ferry service between the two bridges.

Appellant refers to other decisions by the California Railroad Commission as being directly in conflict with its action in the instant case. Such conflict does not exist. What the Commission may have done in fixing rates for a gas or electric utility having a physically interconnected system serving various communities, and the operation of each part depending upon the functioning of the whole, lends little support to the charge that the Commission acted arbitrarily in refusing to treat two competitive bridges as a single rate-making unit.

The lower Court's analysis of the authorities upon the point was entirely correct. In its brief here, appellant has referred to another claimed authority, namely, Clarks-burg-Cohumbus Short Route Bridge Co. v. Woodring et al., 89 Fed. (2d) 788. But the case bears little similarity to the one here. It was a situation where one bridge company demanded the right to be heard by the Secretary of War before he reduced the rates of a competing bridge company. The United States Court of Appeals for the District of Columbia, construing the federal act and invoking a principle applicable to the Interstate Commerce Commission, held merely that the competing carrier was entitled to a hearing in any proceeding affecting its interests. There is not the slightest intimation that, as a matter of

constitutional right; the owner of a less profitable bridge may, because of his own needs, compel the continuance of higher rates on another.

Before concluding reply to appellant's argument on the point, it should be made clear that although the Commission denied appellant's motion to treat the two bridges as a unit, it did say (R. 34) that consideration would be given to the effect of the rates fixed on the company as a whole. That the Commission made this statement with sincerity, and actually did so view the results to flow from its order, we believe may be demonstrated when considering the merits of the claim of confiscation.

#### STATE COURT'S JUDGMENT ON ISSUE OF CONFISCATION:

We need not dwell at length upon the State Court's analysis of each point advanced by appellant in support of its claim of property confiscation. The Court fully and correctly summarized every contention advanced, as to property value, revenue, and rate of return. (R. 133-140.) What should be noticed first of all is the particular objection taken by appellant to certain declarations by the Court paraphrasing the findings made by the Commission. Appellant asserts strongly that the Commission failed to make adequate findings of fact, and that the Court indulged in mere assumptions when it thus reviewed the Commission's conclusions. The Court expressly found otherwise. It declared no difficulty whatever in understanding the facts supporting the Commission's decision. To anyone familiar with the testimony and exhibits con-

tained in the record, there could not have been any uncertainty as to the basis of the Commission's action.

We may proceed, therefore, to examine each claim made by appellant in the Court below and also here, considering first the subject of property value.

#### APPELLANT'S CLAIM OF VALUE.

It is clear that the composition of the rate base upon which appellant here asserts the right to a fair return is as follows:

Book Cost	\$7,949,954.00
Additional Interest During Con-	
struction	382,668.46
Cost of Developing Business	300,000.00
	•
Total	\$8,632,622.46

It is clear that the Court below rejected the last two items as additive to the first, thus affirming the Commission's order fixing rates upon a base of \$7,949,954.00.

Just why the Commission used this figure is perfectly clear. Its opinion (R. 37) sets forth the results of several cost estimates obtained by witnesses in various ways. The Commission said that the costs as shown on the company's books contained questionable items. These costs, as shown in the company's Exhibit No. 117 (R. 410), and the Commission's Exhibit No. 1 (R. 209, 214), plus lands, furniture and fixtures, total \$7,949,954.00.

Let us see now just what appellant's principal witness. Mr. Ready, said in respect to this figure when testifying as to a reasonable rate base to be taken for the purpose of ascertaining reasonable rates. Exhibits Nos. 132 and 134 by this witness, which showed the net earnings at rates theretofore charged, and the estimated earnings at rates which a Commission witness had suggested for the future, were tested by him against a rate base of \$7,949,954.00 and as to the reasonableness of the use of such a base, this witness expressed his opinion in these words (R. 497):

After considering the estimated reasonable historical cost, as set forth in Exhibit 117, and also the possible modifications of the book cost which might be made, including the addition of interest during construction and the possibility that probability that, the Dunn payment should be charged to cost of money rather than overhead-I came to the conclusion that the lowest figure that reasonably could be applied to the property would be the book costs as they stood on the books. It is true that some items might be questioned, but that on the other hand, the erroneous inclusion of interest during construction on the books. and only the interest and amortization of bond discount on the bonds, instead of the interest on the entire capital, plus the possibility of additions on account of the franchise of the Rodeo-Vallejo Ferry. that those factors would more than offset any possible modification. And also, in view of the fact that the books could be used to determine the carital throughout the entire period without making numerous adjustments, I made this study on the basis of the book costs of the Carquinez and Antioch Bridges, as distinguished from the reasonable historical cost or any other item."

This is the only expression by any of appellant's witnesses indicating to the Commission its claim of a rate base to be accepted. True, there were estimates presented as to what the bridge might reasonably have cost then, or . what it might cost today. But at no time was any other figure suggested as reflecting value for rate-fixing purposes under the method proposed by the witness. There was no estimate of accrued depreciation. And what appellant has asserted in its brief for the addition of a going concern value is purely a fiction of counsel, for there is not a line of evidence respecting the measure or even the existence of a going concern value. As to the inclusion of additional interest during construction, it is true that appellant's witness testified thereto, but just as he readily conceded and as the Commission stated in its decision, there were also questionable items of cost included in the book accounts which should be excluded.

Therefore, upon such a showing by appellant, the Commission cannot justly be charged with arbitrary or capricious action in accepting appellant's own showing as a basis for the rate-fixing order. Appellant has not once alleged, either in its pleading in the Supreme Court of California (R. 20) or in its assignments here (R. 197), that it made and pressed a claim for the acceptance of any higher value. True, the Commission did not expressly find that the value or base taken was considered reasonable, and under the circumstances it was not called upon to do so. What the Commission did was perfectly plain, as now readily may be shown.

### DIFFERENCES BETWEEN APPELLANT'S CLAIMS AND COMMISSION'S FINDINGS.

We ask the Court to refer to appellant's Exhibit No. 134, (R. 506 A-D.) From the first of those studies, and from appellant's representations in its brief here (Appellant's Brief p. 148), there has been prepared the table appearing opposite to permit a comparison of appellant's representations before the Commission with its claims here made. We ask the Court to consider also that part of the Commission's opinion (R. 38) which refers to this exhibit.

First. The Commission took Mr. Ready's estimated net revenue of \$629,799.00 for the year 1938, before allowance was made for state and federal income taxes. It then stated that after allowance for such taxes, the resultant net revenue would approximate \$575,000.00. It thus allowed \$54,799.00 for the income taxes accruing against the estimated 1938 revenue, although Mr. Ready's exhibit had shown taxes of \$133,237.00 in that year, he having based such taxes upon the revenue of the preceding year. The difference is \$78,438.00.

Second. The Commission then correctly stated that Mr. Ready later had conceded his estimate of increased traffic to have been too low, he later agreeing that the Commission's witness was correct. (R. 525.) His estimate of revenue from tolls was based directly upon his estimate of traffic, as his exhibit and testimony showed. Hence, the Commission correctly stated that its adjusted net return of \$575,000.00 above referred to should be increased to about \$590,000.00. The rate of return, had the flat 50-cent toll used in the exhibit been prescribed, would have been 7.42 percent.

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Carquinez Bridge Estimated Future Traffic, Rate Base, Operating Revenues, Expenses and Return

	Claimed in Brief AS ESTIMATED BY WITNESS READY—EXHIBIT NO. 134 (RECORD 506 A) Page 148								
	Rates Prescribed by Commission	Actual At Old Rates	AT PROPOSED RATE OF 50 CENTS			S PROPOSED	PROPOSED BY J. G. HUNTER		
	Year 1938	Year 1937	1938	- 1939	1940	1941	1942	1943	
Vehicular Units:	,					`\			
Present Rates 100%		1,720,786	1,596,000	1,624,000	1,652,000	1,682,800	1,716,400	1,747,200	
Proposed Rates 108.87%		· · · · · · · · · · · · · · · · · · ·	1,737,565	1,768,049	1,798,532	1,832,064	1,868,045	1,902,177	
	10 400 400								
Rate Base	\$8,632,622	\$7,949,537	\$7,949,537	\$7,949,537	\$7,949,537	\$7,949,537	\$7,949,537	\$7,949,537	
	-					•			
perating Revenues:	. A1 105 077	44 544 004	*** 000 000	41 DEC 004	41 007 000	41 117 007	41 140 004	* 44 400 401	
Tolls	\$1,135,277	\$1,544,691	\$1,060,036	\$1,078,634	\$1,097,230	\$1,117,687	\$1,140,004	\$1,160,461	
Rents and Miscellaneous	8,243	8,243*	8,243	8,243	. 8,243	8,243	243	8,243	
Total Revenue	\$1,143,520	\$1,552,934	\$1,068,279	\$1,086,877	\$1,105,473	\$1,125,930	\$1,148,347	\$1,168,704	
			1.						
Operating Expenses:				1 110 700				+ +00 000	
Operation and Maintenance	\$ 146,700	\$ 135,084	\$ .146,700	\$ 146,700	\$ 146,700	\$ 146,700	\$ 146,700	\$ 138,300	
Gross Revenue, Tax. (2%)	22,706	31,114	21,201	21,573	21,945	22,354	22,800	23,209	
General Expense	63,852	. 149,970	63,852	63,991	64,365	64,434	64,575	62,186	
Amortization of Investment	206,727	206,727	206,727	1206,727	206,727	206,727	206,727	206,727	
Total Expenses (ex. income tax)	. \$ 439,985	\$ 522,895	\$ 438,480	* \$ 438,991	\$ 439,737	\$ 410,215	\$ 440,802	\$ 430,422	
				1					
et Income before Income Taxes	\$ 703,535	\$1,030,039	\$ 629,799	\$ 647,886	\$ 665,736	\$ 685,715	\$ 707,445	\$ 738,282	
				4			1		
ncome Taxes:	·						+ = 1.000	4 01 700	
Federal Income Tax	\$ 108,511	\$ 66,223	\$ 108,511	\$ 45,073	\$ 40,779	\$ 50,427	\$ 54,899	\$ 61,509	
State Franchise Tax	24,726		24,726		9.821	11,858	13,402	15,951	
Total Income Taxes	\$ 133,237	\$ 66,223	\$ 133,237	\$ 54,309	\$ 50,600	\$ 62,285	\$ 68,301	\$ 77,460	
otal All Expenses	\$ 573,222	\$ 589,118	\$ 571,717	\$ . 493,300	\$ 490,337	\$ 502,500	\$ 509,103	\$ 507.882	
let Revenue	\$ 570,298	\$ 963,816	\$ 496,562	\$ 593,577	\$ 615,136	\$ 623,430	\$ 639,144	\$ 660,822	
ate of Return on Base (above)	6.6%	12.12%	6.25%	7.47%	7.47%	7.84%	8.04%	8.31%	

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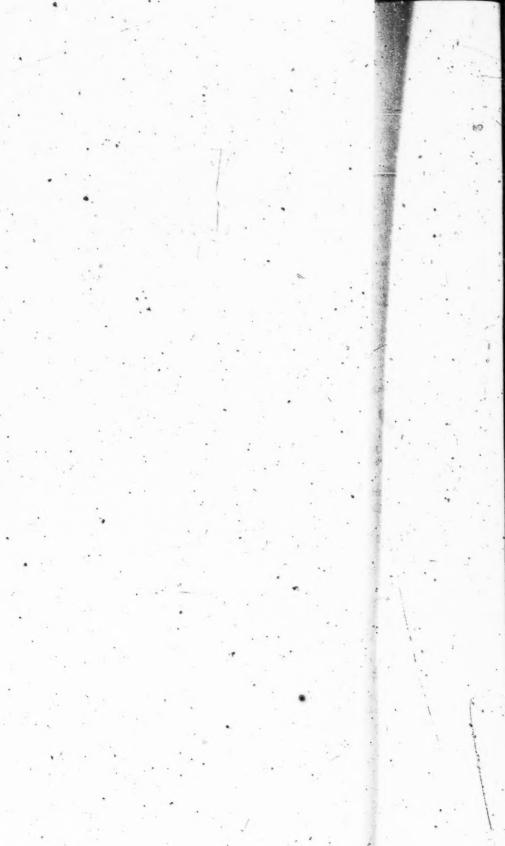
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<sup>\*</sup>Figure corrected to read \$8,243 instead of \$8,242.
\*\*Figure corrected to read \$1,552,934 instead of \$1,522,934.



But, the Commission did not prescribe a flat 50-cent toll. Appellant concedes that the tolls prescribed as reasonable will average 56 cents per car and will yield gross revenue of \$1,143,520.00 (R. 148), instead of \$1,068,279.00, as computed by Mr. Ready in Exhibit No. 134.

So, when the Commission said that although a rate of return of 7½ percent was deemed reasonable for this particular company, but that it would accord earnings in excess of this to guard against any inaccuracies in traffic estimates, it was perfectly correct as to its reasoning and entirely accurate as to the facts leading to such conclusion. With the exception of income tax expense, and the failure of the Commission to accord the rate of return demanded, the appellant may not well dispute any features of the Commission's action.

It is manifest, therefore, that appellant's claim of confiscation of its Carquinez Bridge property is rested upon just three points of difference with the Commission, namely, the rate base, the allowance for income taxes for the first year, and what constitutes a reasonable rate of return. These may be summarized briefly.

#### RATE BASE.

The rate base taken by the Commission in reliance upon the testimony of appellant's witness has already been considered. Inasmuch as appellant argues merely for the addition of two items to that figure, it is unnecessary to do more than refer to those two items. The claimed additional interest is not some interest charge actually incurred during the course of construction. The rate base of \$7,949,954.00 includes \$688,092.00 for interest during construction actually paid. (R. 214.) It includes other overhead or indirect charges additional to the cost of the physical structure totalling fully \$2,000,000.00, or about 35 percent. (R. 335.) And as appellant's witness has conceded that any theoretical deficiency in estimated interest during construction was offset by questionable inclusions in the book costs, it seems quite unnecessary to here examine such costs in detail.

Appellant's argument for the allowance of a going concern value is without any evidentiary basis, whatever. No study of going concern was made, nor its inclusion urged. Appellant now argues that an inclusion in the amount of about 10 percent is the usual thing, and frankly says (Bapp. 140-143) that it computes the claimed allowance of \$300,000.00 by the deficiency of earnings for the first five years below 9 percent. It then adds (Brief, pp. 174-175) that on the less profitable Antioch Bridge, using the same method of computation, it calculates the going value to be \$550,000.

#### EXPENSE FOR INCOME TAXES.

It has been pointed out above that the Commission reduced the state and federal income taxes shown in the amount of \$133,237.00 in appellant's Exhibit No. 134 by \$78,438.00, thus leaving for this item \$54,799.00. When it thereupon increased the toll upon which that exhibit was based, consequently increasing the tax upon net revenue,

it did not say how much such income taxes would be increased. As appellant concedes a net revenue for 1938 of \$703,535.00, before the payment of taxes, and a reference again to Exhibit No. 134 reveals that for the year 1942 there is a comparable taxable net revenue of \$707,445.00, and a tax thereon shown for the following year of \$77,460.00, it may be seen that such amount is adequate also for the year 1938.

The only dispute, of course, is whether the Commission should have tested the expected results for the year 1938 by the inclusion of actual taxes payable during that year on the higher revenue of 1937 at the old rates. It is submitted that the Commission's action in this respect could not reasonably have been otherwise. It was not fixing rates for 1938 alone. It followed its own practice and what we believe to be the ordinary accounting practice.

#### RATE OF RETURN.

From the above brief analysis of the Commission's action, it becomes perfectly evident, therefore, that it actually accorded a higher rate of return than 7.5 percent. It used a base value of \$7,949.954.00. Appellant concedes a net return of \$703,535.00 before allowance for income taxes. The taxes upon such net income, as shown by its calculation for the year 1943, are not in excess of \$77,460.00, thus making a net revenue for 1938 of \$626,075.00. This is a return of 7.86 percent. Upon appellant's claimed rate base of \$8,632,622.00 it would be a return of 7.25 percent, not 6.6 percent as asserted.

What appellant seemingly demands, however, is a return of 9 percent upon both bridges. It develops its argument by referring to what it terms the "cost of money", and says (Brief for Appellant p. 158) that the average cost of money invested in the two bridges is, for the year 1938, equal to 7.85 percent. It then proceeds (p. 159) to attribute to the Court below a statement to the effect that appellant is not entitled to a return as high as the cost of its money. The Court below did not so state. It said it was not persuaded that appellant was entitled as a matter of right to a percentage of net return "equal to what it claims is the cost of money to it". (R. 139.) Therefore, we should now endeavor to discover just how appellant develops its claimed needed return of 9 percent.

The Commission, appellant argues, has always allowed a return to public utilities of about 15 percent more than the cost of money. It is true that the Commission frequently has employed this phrase in testing the reasonableness of rates accorded, but in so doing it has used the term with a meaning materially different from that which appellant here assumes. The Commission has simply meant thereby that the interest return upon all capital she ld at least equal the interest rate which the utility must pay currently for such capital as it obtains from the issuance of securities or other borrowed moneys bearing fixed interest charges. If this is done, the owners of the property may not only meet in full the annual charges upon borrowed funds, but may have for themselves in the way of dividends a rate of return upon their interest in the property of at least an equal rate.

Let us first see just how appellant arrives at its claimed cost of money. It begins (R. 477) with a \$6,500,000.00 issue of 7 and 8 percent bonds in 1925. Against this there is charged not only the full discount and selling expense incurred, but also \$904,000.00 to reflect 565,000 shares of stock donated to underwriters and agents. It then adds to the annual interest charge upon such bonds a sum sufficient to amortize not only the discount and expense incurred, but the whole of the stock donated at the same time. Such bonus stock remains butstanding today with exactly the same standing as other stock. When full provision is made for the retirement of the actual stockholders' interest in the bridge properties, there certainly is no occasion for the preferred treatment of this particular stock by providing for its amortization through the medium of cost of money and the consequent allowance of a higher rate of return.

Then, because in 1935 appellant refunded all such original bonds then outstanding by the issuance of \$4,300,000,000.5½ percent bonds, it seeks to carry forward all such assumed unamortized costs on the earlier issue, including the bonus stock. Its resultant cost of money is 8.95 percent when such charges are amortized on a sinking fund basis and 9.45 percent when amortized on a straight line basis. (R. 477-478.) Although its calculation of the cost of the refunding bonds issued in 1935 shows that there then remained \$440.521.88 designated as unamortized discount and expense on the original issue, the fact is, as the exhibit clearly shows, that the company had by that time actually written off \$1,149,971.00 of the original discount

and expense incurred, including \$904,000.00 of bonus stock. Thus, when excluding such stock, the company had already written off nearly twice the discount and expense of the original issue.

In order not to prolong the discussion of this issue, we may briefly show, by the table below, just what the company actually had to provide for annually when it refunded its securities in 1935, the figures being exactly the same as presented by appellant's witness except for the elimination of the bonus stock amortization:

enumention of the bonds stock amortization.	
Par Value of Bonds	
Net Cash Proceeds	<b>\$4,105,972.30</b>
Interest (51/2%) on par value	\$ 236,500.00
Annual Accrual over 5.893 years to amortize:	
Discount and Expense\$194,027.70	
Premiums payable when called 53,875.00	

•			
Total Annual Cost		\$	278,517.00
Effective Interest	Rate on Net I	roceeds	6.78%

\$247,902,70

42.017.00.

The effective interest rate of 6.78 percent shown above, computed on the straight line basis, is the maximum annual rate in percent which can be said to represent the annual cost today of the company's bond money. And it provides that the accruals for such-amortization be completed in less than six years rather than over the ten-year period during which some of the bonds will be outstanding.

Therefore, when the Commission said that it considered a rate of return of 7½ percent to be reasonable, and al-

lowed a return in excess thereof, it was not fixing rates below a reasonable rate of return or one confiscatory of appellant's property. And when the Commission said that in prescribing rates on the Carquinez Bridge it would give consideration to the effect upon the company's operations as a whole, it obviously did just that. It might be demonstrated by the very figures presented by appellant in its brief that its income from both bridges will yield in excess of 6.8 percent, not merely 5.6 percent as it asserts.

#### CLAIM OF WASTING ASSETS.

Still another argument is advanced by appellant in support of its claim of confiscation. It says that its bridges are "wasting assets", because its franchises were for only twenty-five years and its property therein will be lost in 1948 when those franchises expire. It says (Brief, p. 179) that the Commission failed to recognize such wasting assets.

Appellant's argument in this regard is false in theory and fact. In its brief (p. 185) it says that there is no support in the Commission's decision for the statement made by the State Court that "in computing the net annual receipts, allowances were made for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period." The truth is that the Commission allowed in annual expense of operation every cent claimed by appellant for depreciation of its bridge property. Exhibit No. 134, above referred to and reproduced in part, plainly shows an item of expense for the

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"Amortization of Investment." And there was not the slightest misunderstanding as to just what that allowance provided for. "We computed the annuity", appellant's witness said (R. 499), "which, at 6 per cent, would amortize the investment throughout the life." It is exactly the method appellant has been using from the beginning for the retirement of the investment prior to the expiration of the bridge franchise, and that investment includes every dollar of both the indirect and the direct costs of the bridge. There are no other wasting assets in the structure.

What more, then, does the appellant ask for now? It is this. It says (Brief, p. 186) that to date there has been a deficiency of \$2,404,600.00 in the dividends paid to stockholders under an 8 per cent dividend rate. What it seeks is the making good of such asserted deficiency, as well as to set aside enough to fully retire the bridge investment.

But appellant does not tell the Court that when it began the operation of its two bridges it was then burdened with a corporate debt of approximately two-thirds the total investment in them. It does not reveal that out of earnings and out of its depreciation reserve it had, by August 1, 1937, reduced its bonded debt to \$3,544,000.00 (R. 212), or that it had seen fit to reacquire for cash a considerable amount of its own stock (R. 220), or to invest cash in the purchase of ferry properties. (R. 212.)

It seems obvious enough, therefore, that no matter how the stockholders of the corporation may ultimately fare, any deficiency in their dividends to date does not, of itself, evidence confiscatory earnings from the bridge property.

#### CONCLUSION.

It is submitted that appellant's claim of contract impairment is without support, either in theory or precedent. The claim is rested on an unreasonable construction given to the statutory provisions relied upon. It is contrary to the decisions of this Court. Not only is there a total absence of legislative intent to authorize a minimum rate contract, but there is an expressed constitutional prohibition against the creation of such a contract obligation.

Appellant's assertion that it has been deprived of its property without due process of law, likewise, is based upon claims of fact which are not sustained by the record. No error of fact or of law is revealed in the judgment of the Supreme Court of California.

The judgment below should be affirmed.

Dated, San Francisco. California, April 14, 1939.

Respectfully submitted,

IRA H. ROWELL,

RODERICK B. CASSIDY,

GEORGE E. HOWARD,

Counsel for Appellee,

Railroad Commission of the State of California.



### SUPREME COURT OF THE UNITED STATES.

· No. 704.—OCTOBER TERM, 1938.

American Toll Bridge Co., Appellant,
vs.

Refered Commission of the State of

Railroad Commission of the State of California, et al. Appeal from the Supreme Court of the State of California.

[June 5, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

This appeal is from a judgment of the highest court of the State upholding an order of the state railroad commission that reduces tolls for use of appellant's bridge across the Carquinez Straits between the counties of Contra Costa and Solano. Appellant contends that the order violates Art. I, § 10, of the Constitution; that the commission's procedure was repugnant to the due process clause of the Fourteenth Amendment, and that the order, in violation of that clause, prescribes rates that are confiscatory.

February 5, 1923, the board of supervisors of Contra Costa County, exerting power conferred by state legislation, passed ordinance No. 171 granting to the Rodeo-Vallejo Ferry Company a franchise to construct and for 25 years to operate the Carquinez bridge. June 4, 1923, the same board granted to the Delta Bridge Corporation a like franchise for the construction and operation of a bridge across the San Joaquin River near Antioch, between the counties of Contra Costa and Sacramento. Each ordinance provides that, on the expiration of the franchise, the property rights, including title to the bridge, revert to the adjacent counties. Appellant became the owner of both franchises. The Antioch bridge was opened in January, 1926, and the Carquinez in May, 1927.

When the Carquinez bridge opened, the board of supervisors fixed tolls at 60 cents for automobiles and at 10 cents for each person in a vehicle or on foot.<sup>2</sup> That scale was in operation when

Politica Code, \$6 2843, 2845, 2846, and 2872 (as amended May 8, 1923, Cal. Stats. 1923, p. 272).

The franchise ordinance fixed these tolls at 75 cents and 15 cents.

the commission made the order in question which reduced these charges to 45 and 5 cents, respectively. Jurisdiction over toll bridges having been conferred upon it by a statute of 1937,3 the commission in August of that year on its own motion commenced an investigation of all tell bridges. But, in October following, it commenced a separate proceeding solely to investigate reasonableness of Carquinez tolls. February 8, 1938, it announced its opinion and promulgated the order in question. Appellant obtained judicial review; the court upheld the order. 96 Cal. Dec. 367.

The statutory provisions authorizing the county board to grant the franchises, ordinance No. 171, and the grantees' acceptance constitute a contract between the parties. Contra Costa Co. v. American Toll Bridge Co., (1937) 10 Cal. 2d 359. As to that, there is no controversy. But appellant contends that under the franchise it has a contract right that the bridge tolls shall not be reduced by the public authorities unless it shall first appear that they are yielding a rate in excess of 15 per cent upon the rate base specified by §§ 2845 and 2846, Political Code.

These sections provide:

§ 2845. "The board of supervisors granting authority" to construct a toll-bridge . . . must at the same time: . . .

"2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.

"3. Fix the rate of tolls which may be collected for crossing the bridge ... which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge ... for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year; ... "4

\$.2846. "The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction

<sup>3</sup> Act of August 27, 1937, Cal. Stats. 1937, p. 2473.

<sup>4</sup> By Act of May 9, 1923, par. 3 was amended to read as follows: "Fix the rate of tolls which may be collected for crossing the bridge... which may raise annually an income not exceeding fifteen per cent on the actual cost of the construction or erection of 'the bridge... and such additional income as will provide for the annual cost of operation, maintenance, amort zation and taxes of the bridge...." Cal. Stats. 1923, p. 288.

3

or erection, or the fair cash value thereof, together with the cost of all necessary repairs and mainter ance of the bridge.

The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

The state court held that § 2846 contemplates increases as well as reductions, limited by the 15 per cent maximum, at any time the disproportion is shown to exist. It construed the language of that section to be inconsistent with the intent to contract that appellant shall have a 15 per cent return, if yielded by the tolk specified in the franchise. The opinion explains that: "Rather it is to be assumed that the legislature intended, not only to afford an adequate and proportionate return to the grantee, but that it also intended some measure of protection to the public's right to be charged not more than a reasonable toll for the use of the bridge.

In 1872, when section 2846 was enacted by the legislature, sufficient scope was allowed between both interests, public and private, to permit adequate elasticity in the exercise of the legislative rate-making function in the light of prevailing economic conditions. Such a statute does not savor of a contract obligation to the grantee. Its object was to delegate to and vest in the designated body the power to regulate tolls as circumscribed by the stated limitation."

Upon the issue whether the order is repugnant to the contract clause, "No State shall . . . . pass any . . . Law impairing the Obligation of Contracts," this Court, while inclining to the state court's construction, will decide for itself whether, as claimed by appellant, the franchise by contract limits exertion of sovereign powers to regulate tolls. Georgia Ry. Co. v. Decatur, 262-U. S. 432, 438. Rapid Transit Corp. v. New York, 303 U. S. 573, 593. And, if it plainly appears that it does, this Court will not hesitate so to adjudge. Detroit United Ry. v. Michigan, 242 U. S. 238, 251-253. Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 524, 536. Detroit v. Detroit Citseens Street Ry. Co., 184 U. S. 368, 382, 389. Public Service Co. v. St. Cloud, 265 U. S. 352. Compare Georgia v. Chattanooga, 264 U. S. 472, 480.

Epon an elaborate review of the California legislation relating to bridge tolls, appellant says that in the first period, 1850 to 1857, bridge franchises allowed owners to take only such tolls as the courts of sessions and, later, the county boards should fix annually; that in the second period, 1857 to 864, tolls were limited to those fixed by county boards annually, subject to change by the legisla-

ture; that in the third period, 1862 to 1872, general statutes and special acts authorized such rates as the county boards should annually prescribe, declaring, however, that they should not be so low as to make income less than a specified percentage of a defined base. On that foundation, it maintains that there was an evention of policy to grant to builders and operators of bridges contract rights as to tolls. In that light it examines the language of §§ 2848 and 2846 and concludes that the proper construction of the franchise in question is that unless the yield becomes in excess of 15 per cent the license tax must not be increased and the rate of toll must not be diminished.

We assume, without detailed examination, that the legislation so portrayed indicates that in the period next preceding 1872, when the provisions of § 2846 were enacted, the State had adopted the policy of safeguarding operators of toll bridges against rate reduction by county boards below specified levels. But that fact may not be employed to arrive at a construction not indicated by the language used. So far as concerns the point under consideration, the meaning of the statutory provision is plain. Section 2845 requires the county board, when granting the franchise, to fix the license tax within specified limits and a rate of toll, which must not raise annually an income exceeding 15 per cent of base. See, tion 2846 declares that the license tax and the rate of toll so fixed must not be diminished unless receipts are disproportionate to base. Thus plainly the commands are that at first the talls must be fixed, but not to produce income above the 15 per cent specified, and that the tolls so fixed shall not be diminished unless yield is disproportionate to the defined base. Neither in text nor in reason is the "fifteen per cent" prescribed as maximum yield tied to, or made the test by which to ascertain whether receipts from tolls are, "dispreportionate". We construe these statutory previsions to negative appellant's claim that by the franchise in question the State bargained away power to reduce tolls for use of the Carquinez bridge unless annual return becomes more than 15 per cent. See e. g. Paducah v. Paducah Ry., 261 U. S. 267; 275; Banton v. Belt Line Ry., 268 U. S. 413, 417-419; Railroad Commission v. Lo. Angeles R. Co., 280 U. S. 145, 152, 155. The order is not repugnant to the contract clause

Appellant claims that, in violation of the due process clause of the Fourteenth Amendment, the commission denied it a full and

fair hearing and failed adequately to find the facts. mission initiated the proceeding, entitled "In the matter of the investigation upon the commission's own motion, into the rates, charges, contracts, classifications, rules and regulations of American Toll Bridge Company covering its operation of the toll bridge over the Carquinez Straits between the counties of Contra Costa and Solano"; gave appellant notice that the investigation would extend to tolls for use of that bridge; accorded it opportunity to introduce evidence and present its contentions; and received the evidence offered by it, 233 pages of the printed record and numerous exhibits. Appellant submitted the case for decision without making any request for findings and without argument, of al or The commission, without formal findings, filed its deeision which, sufficiently to meet requirements of due process, indicates the facts on which it made the order.

Then appellant filed petition for rehearing. That document, including eight captions and 12 sub-captions and an exhibit, occupies 39 printed pages of the record.5 It specifically sets forth

I. Introduction.

II. Exclusion of Antioch Bridge.

1. The Facts.

2. Inevitable Effect of Decision on Tolls of Carquinez Bridge, Antioch Bridge and Martin-Benicio Ferry.

3. The Decision is Contrary to the Commission's Own Traditions and

4. The Commission's Action Deprives American Toll Bridge Company of Its Property Without Due Process of Law in Violation of Guarantees of the Federal and the State Constitutions.

III. Failure to Give Fair Return on Fair Value of Carquinez Bridge.

 Calculations of Commission in Computing Its Rate.

2. Errors in Commission's Computations,

(1) Rate Base. (2) Money Available for Return on Rate Base (under 50¢ toll).

3. Return Under Rate Fixed by Commission.

4. In View of the Cost of Money to American Toll Bridge Company, a Return of Only 6.6% or 6.9% on the Fair Value of the Carquinez Bridge Would be Confiscatory. 5. Summary as to Fair Return, Carquinez Bridge.

IV. Failure to Give Fair Return on Fair Value of Carquinez and Antioch Bridges.

. 1. Rate Base.

2. Return Under Rate Fixed by Commission,

- 3. Effect of Commission's Decision Would be to Confiscate Property of American Toll Bridge Company in Both Carquinez and Antioch Bridges.
- L. Under Commission's Tolls American Toll Bridge Company Would be Unable to Meet Its Requirements to Its Bondholders and Stockholders.
- VI. Impairment of Contract Obligations. VII. False Analogy With Publicly Owned and Operated San Francisco Bay Bridges.

VIII. Violation of Constitutional and Statutory Rights.

the grounds on which appellant claimed the decision to be unlawful. These include the commission's determination of the various classes of facts usually considered in cases in which prescribed rates are challenged as confiscatory. The petition contains no hint of claim that the commission denied appellant procedural due process. Nor was that specified in the petition for judicial review. Morgan v. United States, 304 U.S. 1, on which appellant relies, was decided after filing of that petition and before argument in the California court. That court rightly held it not in point.

Appellant also claims that the commission denied it procedural due process by excluding the Antioch bridge rates from the proceeding. It moved to include with this proceeding an investigation of the Antioch bridge tolls. In support of the motion, it suggested that the bridges are part of a single system but compete with each other; that operations of the Antioch are less satisfactory financially than those of the Carquinez; and that reduction of Carquinez tolls would force reduction of Antioch tolls.

In the first instance, at least, determination of the proper unit for rate making was for the commission. The Antioch bridge is not used or useful to render any service covered by the Carquinez tolls; appellant's duty to operate either bridge is independent of its obligation to operate the other. The record discloses no basis on which it reasonably may be held that by limiting the investigation to the Carquinez tolls the commission abused its discretion, and clearly there is no foundation for the claim that in excluding the Antioch the commission denied appellant procedural due process. See Gilchrist v. Interborough Co., 279 U. S. 159, 206, 209. Wabash Valley Elec. Co. v. Young, 287 U. S. 488, 495-8. Florida Power & Light-Co. v. City of Miami, 98 F. 2d 180. International Ry. Co. v. Prendergast, 1 F Supp. 623. Cf. Coney v. Broad River Power Co., 171 S. C. 377.

There is no foundation for the claim that the commission's procedure violated the due process clause of the Fourteenth Amendment.

There remains for consideration the contention that the prescribed rates are confiscatory. The burden is on appellant to show that enforcement of the order will compel it to furnish the service covered by the reduced rates for less than a reasonable rate of return on the value of the property used, at the time it is being used, for that service. And, in the absence of clear and convincing proof that the reduced tolls are too low to yield that return, it may not be adjudged that the State by enforcement of the measure complained of will deprive appellant of its property without due process of law. Chicago &c. Ry. Co. v. Wellman, 143 U. S. 339, 344-345. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 446. Knoxville v. Water Co., 212 U. S. 1, 8, 16. The Minnesota Rate Cases, 230 U. S. 352, 433, 452. Brush Elec. Co. v. Galveston, 262 U. S. 443, 446. Aetna Insurance Co. v. Hyde, 275 U. S. 440, 448.

Appellant fails to establish, by allocation or apportionment to the traffic covered by the tolls so reduced, the operating expenses, cost of depreciation, taxes, and contributions to the sinking fund for amortization of investment that are fairly attributable to the service covered by the order; it also fails to establish the amount of property value that is justly assignable to that traffic. Obviously, the return to be yielded by the reduced tolls cannot be found without comparison of the revenues to be derived from the service with the amounts of operating expenses and other charges rightly to be made against them. Inadequacy of revenues from all traffic does not tend to show that the rates on automobiles and persons prescribed by the commission's order are too low. The Minnesota Rate Cases, supra, 452-453. B. & O. R. Co. v. United States, 298 U. S. 349, 372, 378, 381. It follows that appellant is not entitled to a decree that the order is confiscatory.

More need not be written to dispose of the issues presented in this case. But in view of appellant's earnest contentions, it is not in-

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appropriate to say that the record, considered in the light of its argument, fails to show that the rate reduction will so lesson revenues from the Carquinez bridge that there will remain less than sufficient, under the due process clause, to constitute just compensation for its use—a reasonable rate of return on the value of the bridge property.

Judgment affirmed.

Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Douglas concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.



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